THE INDIAN EVIDENCE ACT

A Critical Commentary
Covering Emerging Issues and International Developments

SECOND EDITION

Dr V Nageswara Rao
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Former Professor, Osmania University, Hyderabad

Foreword by

Hon'ble Mr Justice M Jagannadha Rao
Former Judge, Supreme Court of India
Former Chairman, Law Commission of India

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Chapter I

Introduction, Definitions and Kinds of Evidence

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INTRODUCTION

LAW OF EVIDENCE AS PROCEDURAL LAW

Law is classified into Substantive Law and Procedural or Adjective Law.[1] It is said that Substantive Law is the law that confers powers and rights or imposes duties and liabilities on persons whereas the Procedural Law deals with the procedure by which those rights, duties and liabilities are enforced in a Court of law.[2] The Civil Procedure Code (CPC), Criminal Procedure Code (CrPC) and Evidence Act, are examples of procedural laws and the first two codes lay down what court is to be approached for civil or criminal cases, respectively, the jurisdiction of the Courts etc. and the Evidence Act provides for the methodology by which the cases have to be conducted in the matter of production of relevant oral, documentary and material evidence and the examination of witnesses etc. The Indian Constitution and the Indian Penal Code (IPC) are examples of Substantive Laws. Thus, while Section 302 of IPC provides for death sentence as one of the punishments for the offence of murder, it is Section 354, Clause (5) of CrPC which prescribes the procedure for the execution of the death sentence *i.e.*, that the convict shall be hanged by the neck till he is dead. The procedural laws often contain various safeguards for the accused in criminal cases and provide the flesh and blood to the bare bones of the sometimes pithy and terse provisions of substantive law. Justice Felix Frankfurter of U.S. Supreme Court declared: "the history of American freedom is, in no small measure, the history of procedure."[3] Justice William O Douglas observed: "It is procedure that spells much of the difference between rule by law and rule by whim or caprice."[4]

However, as Salmond says, "it is no easy task to state with precision the exact nature of the distinction between substantive law and the law of procedure."[5] It is not correct to come to the conclusion that it is only the substantive laws that confer rights and that the procedural laws lay down only procedure. Conversely, it is also not correct to presume that substantive laws cannot contain procedural provisions or that procedural laws cannot contain provisions that confer powers and rights or impose

1 It is said that "the dichotomy was fathered by Jeremy Bentham in a 1782 work entitled *Of Laws in General*". See D. Michael Risinger, "'Substance' and 'Procedure' Revisited: With Some Afterthoughts on the Constitutional Problem of 'Irrebuttable Presumptions'", 30 UCLA L. Rev. (1982) 189, at 191. Procedural Law and Adjective Law are treated as synonymous by learned authors. W.W. Cook, "'Substance and 'Procedure' in the Conflict of Laws", Yale Law Journal, Vol. 42, 1933, p. 333.

2 Sir James Fitzjames Stephen said: "A law may be divided into Substantive Law, by which rights, duties, and liabilities are defined, and the Law of Procedure, by which the Substantive Law is applied to particular cases." See, *Digest of Law of Evidence* (London, 1876), Macmillan and Co., Introduction, p. ix. Sir Stephen further observed: "The law of procedure includes, amongst others, two main branches,—(1) the law of pleading, which determines what in particular cases are the questions in dispute between the parties, and (2) the law of evidence, which determines how the parties are to convince the court of the existence of that state of facts which, according to the provisions of substantive law, would establish the existence of the right or liability which they allege to exist" Sir James Fitzjames Stephen, *The Indian Evidence Act: with an Introduction of the Principles of Judicial Evidence* (London, 1872), Macmillan Co., p. 8. Phipson says: "Law is commonly divided into Substantive Law, which defines rights, duties, and liabilities; and Adjective Law, which defines the procedure, pleading, and proof, by which Substantive Law is applied in practice." The term 'procedure' "is, however, often used to include the other two." Phipson, *Manual of the Law of Evidence*, ed. T.S. Elliott, 12th edn., 1987, p.1.

3 *Malinski v. New York*, 324 U. S. 401, 414 (1945), at p. 590.

4 *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951), at p. 179.

5 Salmond on Jurisprudence, 12th edn, P.J. Fitzerald ed., (London, 1966), p.461.

duties.[6] For instance, Section 491 of CrPC of 1898, prior to its omission by amendment in 1973, conferred "Power to issue directions of the nature of a *habeas corpus*" on the High Courts and this writ is now part of the fundamental right conferred by Article 32 and the Constitutional right under Article 226 of the Constitution. Section 300 of the present CrPC of 1973 confers the right of the accused against double jeopardy in a manner wider than under Article 20(2) of the Constitution.[7]

LEX FORI

In Latin, *lex* means law and *forum* means Court and *lex fori* means the law of the Court. Suppose an Indian Hindu marries an American Christian in Paris, sets up his matrimonial home in Geneva and later seeks divorce in Mexico. In this case the Mexican Court will have to first decide which law will be applicable to the case to adjudicate on the issues of grounds of divorce etc. Let us assume that according to the Mexican Law the case has to be decided according to the law of the place where the parties have set up their matrimonial home *i.e.*, the Swiss law. It means that the Mexican Court will apply the Swiss substantive law and decide whether the petitioner had the right to seek a divorce or not. But the Court will follow the Mexican Law relating to its own jurisdiction and other procedures of the Court in conducting the trial of the case. In other words, the Mexican Court will apply its own procedural law as *lex fori* or the law of the Court in matters concerning the procedure but apply Swiss law in matters relating to the substantive rights of the parties. If in this case the husband has pleaded cruelty by the wife as a ground of divorce, the question whether cruelty is a ground of divorce will be decided by the Court according to Swiss law but whether in fact the husband has approached the correct Court in Mexico for filing the case and, if he did, whether he could adduce proper proof of cruelty through witnesses and documents will be decided by the Court according to Mexican procedural law as the *lex fori*. Thus, choice of the Court will result in the choice of the *lex fori* with regard to choice of procedural law.

BRIEF HISTORY OF THE LAW OF EVIDENCE IN INDIA[8]

As Sarkar points out, "before the introduction of the Indian Evidence Act, there was no complete or systematic enactment on the subject". Within the Presidency towns of Calcutta, Bombay and Madras, the Courts established by the Royal Charter followed the English rules of Evidence. Outside the Presidency towns, the law was vague and indefinite as there were no fixed rules of evidence.[9] The mofussil Courts were held to be not bound to apply the English rules of evidence and they were also held to be not

6 Thomas O. Main observes: "laws could be both substantive and procedural or could be neither substantive nor procedural" and that some procedural rules have substantive orientation and *vice versa*. Thomas O. Main, "The Procedural Foundation of Substantive Law", Washington University Law Review, Vol. 87, 2009, pp. 10 and 15. This paper is available from the Social Science Research Network Electronic Paper Collection: http://ssrn.com/abstract=1113916 (last accessed on 28th January, 2015). As Kelsen points out, procedural law also deals with the "organs" (Courts etc) that apply the law and their powers and jurisdiction and, hence, have substantive content. Hans Kelsen, General Theory of Law and State (Cambridge, Mass., 1945), p. 129.

7 While Section 300 covers both *autrefois convict* and *autrefois acquit*, Article 20(2) deals only with *autrefois convict*.

8 See N.D. Basu, Law of Evidence, 6th edn, P.M. Bakshi, ed., (New Delhi, 1998), p.12.

9 See, Sarkar's Law of Evidence: In India, Pakistan, Bangladesh, Burma and Ceylon, 14th edn, Sudeepto Sarkar and V. Manoher, Vol.1 (1993), p.1.

bound by the rules of evidence contained in the customary Hindu Law and Muslim Law.[10] Consequently, there was a certain amount of caprice and arbitrariness in the administration of the law of evidence[11] and perhaps this anarchy paved the way for the eventual enactment of the Indian Evidence Act based on the English rules of evidence. Though some attempts have been made between 1835 and 1853 through legislative action to codify and reform the existing rules of evidence, the attempts proved to be fragmentary and desultory. Though the Act of 1855 proved to be "the most important and contained valuable provisions", this Act also "did not contain a complete body of rules".[12]

First Evidence Bill of the Indian Law Commissioners

What proved to be the curtain raiser for the Indian Evidence Act of 1872 was the Draft Bill on Evidence of 1868 prepared by the Indian Law Commissioners under the Chairmanship of Mr. Henry James Sumner Maine[13] (later Sir Henry Maine). Mr. Maine described the existing state of judicial anarchy in the administration of law of evidence as "eminently unsatisfactory" but also found that the wholesale importation of the English rules of evidence as unsuited to Indian conditions. However, the Draft Bill did not pass even the stage of the first reading in the Parliament and it was subjected to criticism on the grounds that the Bill was not sufficiently simple for its application by the Indian judges who were not well versed in English rules of evidence, and that the Bill was incomplete in certain respects.

James Fitzjames Stephen's Bill on Evidence of 1871

It was the Bill on Evidence prepared by James Fitzjames Stephen[14] in 1871 that was ultimately passed into the Indian Evidence Act of 1872.[15] The Act, generally acclaimed as a great example of craftsmanship in draftsmanship, was entirely based

10 *R v. Khairulla*, 6 W.R.Cr 21 (per Peacock, CJ).

11 See Sarkar's Law of Evidence: In India, Pakistan, Bangladesh, Burma and Ceylon, 14th edn. Sudeepto Sarkar and V. Manoher, Vol.1 (1993), p.1.

12 Ibid., p.2.

13 Mr. Maine was for seven years the Law Member of the Governor General's Council of India and the famous founder of Comparative School of Jurisprudence. He was born in India in 1822 and died at Cannes, France, in 1888.

14 Mr Stephen (later Sir James Stephen) was appointed, on the recommendation of his predecessor Sir Henry Maine, as the Law Member of the Governor General's Council of India from 1869 to 1872. See, for an interesting biography of Sir Stephen by his brother Leslie Stephen, *The Life of Sir James Fitzjames Stephen*, (London, 1895), now available on the Internet from 28th May, 2009 at http://www.archive.org/details/lifeofsirjamesfi00stepuoft (last accessed on 28th January, 2015); and also K. J. M. Smith, "Stephen, Sir James Fitzjames, first baronet (1829–1894)", *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edn, May 2006 [http://www.oxforddnb.com/view/article/26375 (last accessed on 28th January, 2015)]. Sir James Stephen was a contemporary of John Austin, the 'Father of Jurisprudence' and founder of Analytical School of Jurisprudence, and Sir Stephen was referred to as "esteemed and faithful friend" of John Austin by Mrs. Sarah Austin in her "Preface" to John Austin, Lectures on Jurisprudence or, The Philosophy of Positive Law, Vol 1, 3rd edn, Robert Campbell, ed., (London, 1869), p.13. Sir James Stephen was a cousin of the famous jurist A.V. Dicey, the author of the classic *An Introduction to the Study of the Law of the Constitution* (1885) and the uncle of the author Virginia Woolf.

15 Sir Stephen said: "In the years 1870-1871 I drew what afterwards became the Indian Evidence Act (Act i of 1872). This Act began by repealing (with a few exceptions) the whole of the Law of Evidence then in force in India, and proceeded to re-enact it in the form of a code of 167 sections, which has been in operation in India since September 1873. I am informed that it is generally understood, and has required little judicial commentary or exposition." Sir James Fitzjames Stephen, A Digest of Law of Evidence, Introduction, (1876, London), p. iii.

upon the English rules of evidence[16] and was compendious consisting of only 167 sections. The Act was so well received that, in his Digest of Law of Evidence, Sir Stephen mentions that he was asked by Mr. Coleridge, the then Attorney General,[17] to prepare a draft Evidence Bill for England and Sir Stephen prepared the draft. However, the Bill was never passed as the Parliament was prorogued and the Bill fell through.[18] While commenting on the Bill Mr. Stephen stated that the Bill was drafted on the lines of the Indian Evidence Act and the objective has been to "enable students to obtain a precise and systematic acquaintance with it in a moderate space of time, and without a degree of labour disproportionate to its importance in relation to other branches of the law."[19] This comment of Sir Stephen is equally applicable to the Indian Evidence Act also. Sir Stephen was also responsible for the drafting of the Indian Contract Act of 1872 and the Criminal Procedure Code, 1898.[20] Speaking of Sir Stephen's lasting contribution to the Indian Evidence Act, John Heydon observes:

> Although it has been amended it has not been changed substantially. It was examined twice with great thoroughness by the Law Commission of India, in 1977[21] and 2003,[22] but no proposal for radical amendment was made then, or at any other time. It was enacted only for British India (and thus for places like Aden which were technically part of British India). But it also went into force in numerous other parts of India (in some of the princely states) before 1947. After independence the Act was extended to, and remains in force in, the whole of the Republic of India (save for Jammu and Kashmir). It is also in force in Pakistan, Bangladesh, Sri Lanka and Burma. It has heavily influenced the laws of Malaysia, Singapore, Brunei, Kenya, Nigeria, Uganda, Zanzibar, parts of the West Indies and even parts of Australia—the Christmas and Cocos (Keeling) Islands. T O Elias said it 'is a model of its kind'.[23]

16 Sir Stephen observed: "The Indian Evidence Act is little more than an attempt to reduce the English law of evidence to the form of express English law propositions arranged in their natural order, with some modifications rendered necessary by the peculiar circumstances of India." Sir James Fitzjames Stephen, The Indian Evidence Act: with an Introduction of the Principles of Judicial Evidence (London, 1872), Macmillan Co., p.2.

17 Mr. Coleridge was later elevated as Lord Coleridge.

18 Sir Stephen was also entrusted with drafting a Criminal Procedure Code for England, and the U.K. Law Commission says that he "endeavoured to adapt his Indian models to English uses." This draft Bill also fell through with when the Parliament was prorogued. The Law Commission says that the Bill came in for criticism on the ground, *inter alia*, of the "quality of work". U.K. Law Commission, *Criminal Law: Codification of the Criminal Law*, (Law Com. No. 143), (London, 1985), pp.1-2.

19 James Fitzjames Stephen, *A Digest of Law of Evidence* (1876, London), Introduction, p.iv.

20 John D. Heydon, "Reflections on James Fitzjames Stephen", Queensland Law Journal, July 2010, p.1. See also, KJM Smith, *James Fitzjames Stephen, Portrait of Victorian Rationalist*, (Cambridge University Press 1988).

21 69th Report under the Chairmanship of Justice Prahlad B. Gajendragadkar. Referring to the 69th report, the 185th Report of the Law Commission says: "That Report…is probably one of the most scholarly works ever produced by the Law Commission of India in the last five decades. The Report contains such abundant research material good enough for half a dozen post graduate students or Ph.D. scholars. The amount of industry put in by the Fifth Law Commission in preparing the 69th report by going into the very origin of every section and every principle of law, with references to comparative law in various countries, is indeed unsurpassable. Unfortunately, it was kept pending from 1977 to 1995. The task before the present Commission to review such a report is therefore extremely daunting." The 185th Report, Part II, Introduction, p. 2.

22 185th Report under the Chairmanship of Justice M. Jagannadha Rao. This report which came 25 years after the 69th report is as scholarly and thorough-going as the 69th report and threw new light on various provisions and illustrations of the Evidence Act in the light of later developments in India and elsewhere.

23 Heydon, "Reflections on James Fitzjames Stephen", Queensland Law Journal, July 2010, p. 10.

Though the Indian Evidence Act of 1872 purports to "consolidate, define and amend the Law of Evidence",[24] the Act does not exhaust the whole corpus of the rules of evidence.[25] For instance the CrPC contains an exclusionary rule of evidence in Section 162 under which the statements made by any person to the police during the course of investigation are barred from being used in a Court of law. Similarly, Sections 306 and 307 of CrPC permit the magistrate to tender pardon to an accomplice for getting true and full disclosure of facts. This is obviously an exception to Section 24 of the Evidence Act which bars confessions made under inducement, threat or promise proceeding from a person in authority. In fact the CrPC contains a whole Chapter XXIII on "Evidence in Inquiries and Trials". Similarly, the CPC also contains provisions on "Admissions" (Order XII), on "Hearing of the Suit and Examination of Witnesses" (Order XVIII) and other provisions which directly relate to evidence. It must, however, be stated that though certain rules relating to evidence may be found in enactments other than the Evidence Act,[26] the Evidence Act is a complete code in itself and no judge can override the mandatory provisions of the Evidence Act and admit evidence not admissible under the statute.

Territorial Application of the Act

S. 1. Short title, extent and commencement.—This Act may be called the Indian Evidence Act, 1872.

It extends to the whole of India[27] except the State of Jammu and Kashmir and applies to all judicial proceedings in or before any Court, including Court-martial, other than Courts-martial convened under the Army Act (44 and 45 Vict.,c.58), the Naval Discipline Act (29 and 30, Vict.,c.109) or the Indian Navy (Discipline) Act,1934 (34 of 1934) or the Air Force Act (7Geo.5.,C51)] but not to affidavits presented to any Court or Officer, nor to proceedings before an arbitrator;

And it shall come into force on the first day of September, 1872.

"Territory of India"

Under Section 1, the Indian Evidence Act, 1872 came into force on 1st September, 1872 and its territorial application "extends to the whole of India except the State of Jammu and Kashmir." Section 3 defines "India" as "the territory of India excluding the State of Jammu Kashmir."[28] Though the term "territory" is derived from the Latin term "terra" which means land, the legal concept of "territory" includes not only the land but also inland waters like rivers and lakes, a belt of coastal sea called

24 See the Preamble to the Act.
25 See, Ratanlal and Dhirajlal, *The Law of Evidence*, 21st edn, Y.V. Chandrachud and V.R. Manohar, ed. (New Delhi, 2004), 2009 reprint, p.2.
26 See, for instance, Bankers Books Evidence Act of 1891 and Commercial Documents Evidence Act 1939.
27 The Act extended to the Union Territories of (1) Dadra and Nagar Haveli, w.e.f. 1-7-1965 (*vide* Regulation 6 of 1963); (2) Goa, Daman and Diu (*vide* Regulation 11 of 1963); (3) Pondicherry w.e.f. 1-10-1963 (*vide* Regulation 7 of 1963) and (4) Lakshadweep w.e.f. 1-10-1967 (*vide* Regulation 8 of 1965).
28 Section 18 of IPC contains an identical definition of the term "India".

Territorial Sea up to a distance of 12 nautical miles and aerospace above the land and Territorial Sea. So, "territory" is three dimensional comprehending land, water and aerospace. Under Article 1, clause 3 of the Constitution, the territory of India shall comprise the territories as specified in the First Schedule, namely, (a) the territories of the States and (b) the Union Territories, and (c) such other territories as may be acquired. India acquired territories by (i) the liberation of Goa, Diu and Daman from the Portuguese colonial rule (1961), (ii) by voluntary merger of Sikkim with India (1976) and (c) by exchange (cession) of certain enclaves of territory with the then East Pakistan (Berubari Enclaves etc) under the Nehru-Noon Pact of 1958 as finally implemented by the Land Boundary Agreement between India and Bangladesh signed by Indira Gandhi and Sheikh Mujeebur Rahman of 1974.

"Judicial Proceedings"

The Evidence Act applies to all "judicial proceedings". The term "judicial proceeding" is not defined in the Act and there appear to be three tests for the determination of whether a proceeding is judicial or not:

1. **Objective Test:** "An enquiry is judicial if the object of it is to determine a jural relation between one person and another or a group of persons or between him and the community generally; but, even a judge, if not acting with such an object in view, is not acting "judicially."[29] Here "jural" means relating to law or to legal rights and obligations.
2. **Functional Test:** Section 2, clause (i) of CrPC defines as follows: "'Judicial Proceeding' includes any proceeding in the course of which evidence is or may be legally taken on oath." Here the test is whether the body conducting the proceeding is authorized by law to receive evidence and decide on the basis of that evidence.[30]
3. **Approach or Process Test:** Another very important test that is invariably applied is whether the decision-making process involves the application of a judicial mind or judicial discretion which is guided by the evidence adduced by both the parties. This test distinguishes the judicial proceeding from a proceeding or an enquiry conducted by an administrative body where the final outcome depends on the facts discovered by the body which is not clothed with any discretion. Fact-finding and enquiry commissions come under this category. It must be remembered that just because a legislative enactment provides that a body shall be deemed to be a Court for the purposes of summoning documents and following the principles of natural justice (like giving notice to and hearing both the parties etc) it does not make its proceedings judicial. Those proceedings, in spite of having certain trappings of a Court, are not strictly judicial proceedings. A proceeding may be a quasi-judicial proceeding without being strictly a judicial proceeding.

It is obvious that all the above three tests are to be applied cumulatively in the determination of the nature of a proceeding as judicial or not.

Consequently, the following proceedings are not judicial proceedings.

29 *Queen Empress v. Tulja*, (1887) 12 Bombay 36.
30 In an often quoted passage Spankie, J., said that judicial proceeding is "any proceeding in the course of which evidence is or may be taken, or in which any judgment, sentence or final order is passed on recorded evidence." *R v. Ghulam Ismail*, 1 ILR All 1.

- *Departmental Proceedings*[31] against employees in disciplinary matters, disciplinary proceedings under Article 311 for the dismissal, reduction in rank etc of the civil servants of the Central and State Governments are not judicial proceedings.
- With regard to *proceedings before Labour Court or Industrial Tribunal* under the Industrial Disputes Act, 1947, in *Shankar Chakravarthi v. Britannia Biscuits,*[32] the Supreme Court held:

> The Labour Court or Tribunal has to decide the *lis* between the parties on the evidence adduced before it. While it may not be hide bound by the rules prescribed in the Evidence Act it is nonetheless a quasi-judicial Tribunal proceeding to adjudicate upon a *lis* between the parties arrayed before it and must decide the matter on the evidence produced by the parties before it. It would not be open to it to decide the *lis* on any extraneous consideration. Justice, equity and good conscience will inform its adjudication.

- Position of *Commissions of Enquiry* is also the same. For instance, Section 4 of the Commission of Enquiry Act of 1952 provides:

> S. 4. **Powers of Commission.**—The Commission shall have the powers of a civil court, while trying a suit under the Code of Civil Procedure, 1908 (5 of 1908) in respect of the following matters, namely—
>
> a. summoning and enforcing the attendance of any person from any part of India and examining him on oath;
> b. requiring the discovery and production of any document;
> c. receiving evidence on affidavits;
> d. requisitioning any public record or copy thereof form any court or office;
> e. issuing commissions for the examination of witnesses or documents;
> f. any other matter which may be prescribed.

Recently in *Dr. Subramanian Swamy v. Arun Shourie*,[33] one of the issues was whether when a sitting Supreme Court Judge is appointed as a Commissioner by the Central Government under the 1952 Act, does he carry with him all the powers and jurisdiction of the Supreme Court? The Supreme Court held that the sitting judge does not carry with him the status of the Apex Court judge as he exercises only the statutory function under the 1952 Act. The Court further held that "the Commission has the powers of civil court for the limited purpose as set out in that Section. It is also treated as a civil court for the purposes of Section 5(4). The proceedings before the Commission are deemed to be judicial proceedings within the meaning of Sections 193 and 228 of the Indian Penal Code," but "the Commission appointed under the 1952 Act in our view is not a Court and making the inquiry or determination of facts by the Commission is not of judicial character."

31 See, *Commissioner of Police, Delhi v. Narendra Singh*, AIR 2006 SC 1800 : (2006) 4 SCC 265, where it was held that a confession made to a police officer would be admissible in a departmental proceeding as S. 25 of the Evidence Act is not applicable to such proceedings.
32 *Shankar Chakravarthi v. Britannia Biscuits*, AIR 1979 SC 1652 : (1979) 3 SCR 1165.
33 *Dr. Subramanian Swamy v. Arun Shourie*, AIR 2014 SC 3020 : 2014 (8) SCALE 679.

On the other hand, some of the proceedings relating to election offences etc under the Representation of People Act of 1951 are of a quasi-criminal nature,[34] and the provisions of the Evidence Act are made applicable to the proceedings under the Act and they are considered as judicial proceedings.[35]

Arbitration Proceedings

Section 1 of the Evidence Act clearly provides that the Act does not apply to "proceedings before an arbitrator" and it does not make any distinction between statutory arbitrations under, for instance, Section 10 of the Industrial Disputes Act, 1947 or private arbitrations under the Arbitration and Conciliation Act of 1996. The 1996 Act repealed the old Arbitration Act of 1940 and provides in Section 19, clause (1) that the arbitral tribunal constituted under the Act "shall not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872." Under clause (2), the parties are free to agree on the procedure to be followed by the tribunal and, failing that agreement, the tribunal under clause (3) may "conduct the proceedings in the manner it considers appropriate." Under clause (4), "the power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence." It is significant that the Act gives total autonomy to the parties in this respect and does not even require that the procedure agreed to by the parties or laid down by the arbitrator shall comprise the principles of natural justice.

Though Section 89, clause (1)[36] of the CPC provides for settlement of disputes by arbitration by reference by the Court,[37] clause 2(a) provides that these arbitration proceedings shall be deemed to be proceedings under the Arbitration and Conciliation Act of 1996. In the light of what has been stated above, arbitration proceedings under Section 89 of CPC also are not governed by the Evidence Act.

"Courts Martial"

Section 1 of the Act states that the Act shall apply to "Court-martial, other than Courts-martial convened under the Army Act (44 and 45 Vict.c.58), the Naval Discipline Act (29 and 30, Vict., c.109) or the Indian Navy (Discipline) Act,1934 (34 of 1934) or the Air Force Act (7Geo.5.,C51)." The four enactments referred to are the Acts of the United Kingdom and the Courts Martial set up under those Acts are not governed by the Act. However, these Acts have their Indian counterparts in Army Act, 1950, the Air Force Act, 1950 and the Navy Act, 1957 which were enacted by the Indian Parliament after the independence, and the Evidence Act applies to the Courts Martial set up under those Acts, subject to their other provisions. Section 133 of the Army Act, 1950, Section 130 of the Navy Act, 1950, and Section 132 of Air Force Act, 1950 provide identically that: "The Indian Evidence Act, 1872, (1 of 1872) shall, subject to the provisions of this Act, apply to all proceedings before a court-martial." As the three enactments contain detailed

34 See, *Jagdev Singh v.Pratap Singh*, AIR 1965 SC 183 where the Supreme Court observed that the Petitioner in an election petition has to prove the election offence beyond all reasonable proof and not merely on the basis of preponderance of probabilities. See also *Golla Jayamma v.District Collector, Mehboobnagar*, 2009 (2) ALT 344 where the AP High Court held similarly.
35 See Section 87(2) of the Act of 1951.
36 As amended by the Act 46 of 1999, w.e.f 1-7-2002.
37 This is known as Court-annexed arbitration.

provisions regarding evidence and procedure, to that extent the application of the Evidence Act will be restricted.

"Affidavits"

An affidavit[38] is a sworn statement made by a person as to the truth of the facts within his knowledge mentioned therein. Order XIX, Rules 1, 2, 3 and 4 etc of CPC and Section 297 etc of CrPC regulate the operation of affidavits. Order XVIII, Rule 4 of CPC as amended in 2002 requires that "in every case" examination in chief shall be given by affidavit and that cross examination and re-examination shall be by oral evidence recorded by the Court or the Commissioner appointed for the purpose. Section 296 of CrPC deals with "evidence of formal character on affidavit" and provides:

> **S. 296. Evidence of formal character on affidavit.**—(1) The evidence of any person whose evidence is of a formal character may be given by affidavit and may, subject to all just exceptions, be read in evidence in any inquiry, trial or other proceeding under this Code.
>
> (2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any such person as to the facts contained in his affidavit.

The Supreme Court Rules of 2013[39] provide in Order IX dealing with "Affidavits":

> 1. The Court may at any time, for sufficient reason, order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable:
>
> *Provided* that where it appears to the Court that either party *bona fide* desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.
>
> 2. Upon any application evidence may be given by affidavit; but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent, and such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court or the Court otherwise directs.

Under Section 3 of the Evidence Act oral evidence is defined as statements made by witnesses in a court of law and as affidavits are not statements made by witnesses in a court of law, the affidavits were held to be not evidence.[40] Section 1 of Evidence

38 Section 3 of the General Clauses Act, 1897, merely states that "'affidavit' shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing".

39 The Supreme Court Rules were promulgated by the Supreme Court in exercise of powers under Article 145 of the Constitution to "make rules for regulating generally the practice and procedure of the Court", and have been brought into force by the Chief Justice of India w.e.f. 19-8-2014 *vide* GSR 367(E). dated 27th May, 2014. The Extraordinary Gazette is available on http://supremecourtofindia.nic.in/Supreme%20Court%20Rules,%202013.pdf (last accessed on 28th January, 2015).

40 See, *Rita Pandit v. Atul Pandit*, AIR 2005 AP 253; and *FDC Ltd. v. Federation of Medical Representatives of India*, AIR 2003 Bom 371.

Act expressly excludes the affidavits from its purview and provides that the Act does not extend "to affidavits presented to any Court."

DEFINITIONS

SECTION 3 OF THE INDIAN EVIDENCE ACT

Section 3 contains important definitions of the terms that are used in the Indian Evidence Act.

"Court"

> "Court" includes all Judges[41] and Magistrates, and all persons, except arbitrators, legally authorised to take evidence.

Though the above definition uses the word "includes" giving an impression that it is an inclusive and not an exhaustive definition, the last part of the provision "all persons, except arbitrators, legally authorised to take evidence" indicates the criterion for identifying what a Court is. The same test is applied by Section 2(i) of CrPC in defining "judicial proceeding" as:

> "Judicial proceeding" includes any proceeding in the course of which evidence is or may be legally taken on oath.

Section 20 of IPC defines "Court of Justice" as:

> The words "Court of Justice" denote a judge who is empowered by law to act judicially alone, or a body of judges, which is empowered by law to act judicially as a body, when such judge or body of judges is acting judicially.

It has been pointed out above that Section 1 of the Evidence Act uses the words "judicial proceedings in or before any Court" and that three tests may be applied to determine the nature of judicial proceedings, namely, objective, functional and process tests. While Section 20 of IPC applies the process test of acting judicially, Section 3 of the Evidence Act and Section 2(i) of CrPC apply the functional test of whether the body is legally authorised to take evidence.

Obviously, the Courts established under CPC and CrPC and constituted under the Constitution of India are typically Courts. Then the question that arises is whether or not the provisions of other Central or State Acts under which the tribunals are constituted empower the tribunals to receive evidence in deciding the cases before them. For instance, the Central Administrative Tribunal Act of 1985 provides in Section 22(1) (Procedure and Powers of Tribunal) that the CPC will not apply to the

41 The term "Judge" is defined in Section 19 of IPC as: "The word 'Judge' denotes not only every person who is officially designated as a Judge, but also every person who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive, or who is one of a body of persons, which body of persons is empowered by law to give such a judgment." Under Section 2(y) of CrPC the above definition in IPC is deemed to have been adopted by CrPC. The Judges Protection Act, 1985 provides a similar definition in Section 2. CPC gives a narrower definition for its own purposes in Section 2(8) which says: "'Judge' means the presiding officer of a Civil Court."

Tribunal but shall be "guided" by the principles of natural justice and shall have the power to regulate its own procedure. Clause (3) of Section 22 confers on the Tribunal certain powers of a Civil Court in matters including summoning of a person and examining him on oath, requiring production of documents and receiving evidence on affidavits etc. In *Shell Co. of Australia v. Federal Commission of Taxation,*[42] Lord Shankey observed: "...there are tribunals with many of the trappings of a court which, nevertheless, are not courts in the strict sense of exercising judicial power." Recently the Indian Supreme Court held that "...all tribunals are not courts though all courts are tribunals."[43]

It is submitted that the test applicable under Section 3 of the Evidence Act for determining whether a body is a Court or not is not whether the Evidence Act will apply to the proceedings before the body, because that is exactly the question to be decided, but whether the body is "legally authorised to take evidence". If the answer is yes, the Evidence Act would apply to it unless its application is expressly excluded by the Act under which that body is constituted. In *Associated Cement Companies Ltd. v. P.N.Sharma,*[44] Gajendragadkar, C.J., observed:

> As in the case of courts, so in the case of Tribunals, it is the State's inherent judicial power which has been transferred and by virtue of the said power, it is the State's inherent judicial function which they discharge. Judicial functions and judicial powers are one of the essential attributes of a sovereign State, and on considerations of policy, the state transfers its judicial functions and powers mainly to the courts established by the Constitution; but that does not affect the competence of the State, by appropriate measures, to transfer a part of its judicial powers and functions to Tribunals by entrusting to them the task of adjudicated upon special matters and disputes between parties.[45]

Departmental proceedings for taking disciplinary action against an employee have been held by a long chain of decisions as not amounting to judicial or Court proceedings and the punishment that may be meted out to the employee will not attract the doctrine of Double Jeopardy as the proceedings and the penalty that may be imposed on the employee do not amount to prosecution and punishment.

As far as the arbitral tribunals are concerned, of course Section 3 makes it clear that arbitrators do not come within the definition of the term "Court". But the words "legally authorised to take evidence" in Section 3 should be taken to mean not "authorised under the law" but "authorised by the law". Section 19 of the Arbitration and Conciliation Act of 1996 offers an interesting insight into the question and states:

42 *Shell Co. of Australia v. Federal Commission of Taxation,* 1931 AC 275: 1930 All ER 671 (PC).
43 *S.D. Joshi v. High Court of Bombay,* (2011) 1 SCC 252, at p. 268, para. 62 : AIR 2011 SC 848.
44 *Associated Cement Companies Ltd. v. P.N. Sharma,* AIR 1965 SC 1595.
45 See also *Union of India v. R. Gandhi,* (2010) 11 SCC 1: 2010 (5) SCALE 514, where the Supreme Court observed: "These Tribunals have the authority of law to pronounce upon valuable rights; they act in a judicial manner and even on evidence on oath, but they are not part of the ordinary Courts of Civil Judicature. They share the exercise of the judicial power of the State, but they are brought into existence to implement some administrative policy or to determine controversies arising out of some administrative law. They are very similar to Courts, but are not Courts." See also, *Madras Bar Association v. Union of India,* 2014 (11) SCALE 166 : (2014) 368 ITR 42 (SC) where the Supreme Court struck down National Tax Tribunal Act, 2005 on the ground that the constitution, composition and powers of the National Tax Tribunal established by the Act violated the basic structure of the India Constitution.

S. 19 Determination of rules of procedure.—(1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).

(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

(3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.

(4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

While Clause (1) of the above provision expressly excludes the application of CPC and Evidence Act, Clause (2) states that "the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings". If the parties fail to agree on procedure, Clause (3) leaves the matter entirely to the discretion of the tribunal, which "includes the power to determine the admissibility, relevance, materiality and weight of any evidence." From this and other provisions of the 1996 Act it is clear that arbitration is privatised to a great extent and the very constitution, composition and procedure of the "tribunal" is left to the agreement by the parties. While the "tribunal" might be "authorised" to take evidence, the authority does not flow from the statute itself directly but from the agreement of the parties or the tribunal's own discretion as stated by the Act.

"Fact", "Fact in Issue" and Relevant Fact

The definitions of the terms mentioned above are discussed in the Chapter on Relevancy.

"Proved", "not Proved" and "Disproved"

The term proof is not defined in the Evidence Act but the terms "Proved", "Not Proved" and "Disproved" are defined in Section 3 as follows:

> **"Proved".**—A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

> **"Disproved".**—A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

> **"Not proved".**—A fact is said not to be proved when it is neither proved nor disproved.

An analysis of the definition of the term "proved" mentioned above gives an insight into the criteria that go into the process of proof.

(1) A fact is said to be proved when the Court

(2) after considering the matters before it

(3) (a) either believes it to exist or

(b) considers its existence so probable

(4) that a prudent man ought under the circumstances of the particular case, to act upon the supposition that it exists.

The above definition is very significant in that it refers to four pivotal factors: (1) it is the Court which is the forum that decides; (2) the Court decides on the basis of evidence or "matters" before it; (3) it relates to proof of "a fact" not the entire case and (4) the standard of proof is neutral standard of an ordinary prudent man. It is noteworthy that the Evidence Act, neither in the above definition of "proved" nor in Chapter VII on "Burden of Proof" makes any distinction between different standards of proof in civil and criminal cases.[46] Under criterion (3) mentioned above, the Court (a) either believes a fact to exist or (b) considers its existence so probable. It is very significant that the Act does not insist on "certainty" but only "belief" and "probability". The "belief" and "probability" are not uncanalised subjective inferences but conclusions arrived at after scrutinizing all relevant facts and "after considering the matters before it".

As Justice V.R. Krishna Iyer observed, "Relevancy is tendency to make a fact probable".[47]

But, in arriving at the conclusions mentioned above the Court shall not apply the high standards of a judicially trained mind, but place itself in the shoes of a "prudent man" and see whether such "a prudent man ought under the circumstances of the particular case, to act upon the supposition that it exists." At a time when the jury system was in vogue, the standard of a "prudent man" was institutionalized in the form of a jury consisting of twelve ordinary prudent persons drawn from different walks of life. The jury was required to decide all questions of fact whereas the judge would decide the questions of law. After the abolition of the jury system in India, the judge is required to perform both the functions.

As the Evidence Act deals with rules of evidence applicable to the Court proceedings, it is *the Court* which has to decide whether a fact exists or not. In other words, it is the satisfaction of the Court that is determinant and can only be arrived at:

- "after" considering the matters before it i.e., as discussed above, it is the Court's objective satisfaction. The Court's satisfaction relates to and founded upon the consideration of the matters before it.
- it is significant that the Evidence Act does not confine the "matters before" the Court only to "evidence" admissible under the Act (Sections 5-55) but extends to other matters.

These "matters" would include:

46 See the discussion on this aspect in Chapter XVIII *infra*.
47 *Nandini Satpathi v. P.L. Dani*, (1978) 2 SCC 424 : AIR 1978 SC 1025.

1. Affidavits, admissions, confessions, Court's personal visits, demeanour of witnesses, Court's own assessment of probative value of evidence and reliability of witnesses etc.
2. "Not merely can the Court base its conclusion on the effect of the evidence taken as a whole but it may also draw adverse inferences against a party who being in a position to adduce better evidence deliberately abstains from doing so."[48]
3. Section 280 of CrPC requires that, after recording the evidence of a witness, the Court "shall also record such remarks (if any) as he thinks material respecting the demeanour of such witnesses whilst under examination." It is said that "the appellate court is generally loath in disturbing the finding of fact recorded by the trial court. It is so because the trial court had an advantage of seeing the demeanor of the witnesses."[49]
4. Order XVIII, Rule 12 of CPC also provides that "the Court may record such remarks as it thinks material respecting the demeanour of any witness while under examination."
5. Under Section 313, Clause 1 of CrPC, the Court may put such questions to the accused as the Court considers necessary, without even administering an oath to him (Clause 2). An accused cannot be technically considered as a witness if an oath is not administered to him. Section 313, Clause 4 says that "that the answers given by the accused may be taken into consideration in such enquiry or trial".
6. "The expression 'matters' has wider connotation than the word 'Evidence'.... this does not mean that the Court can look into anything and everything by bringing it within the contours of the word 'matter'. The word 'matter' has been used because the Court has been empowered by the Evidence Act to raise some presumptions as in Section 114 of the Act, which permits the Court to presume the existence of any fact which it thinks likely to have happened in their relation to the facts of the particular case."[50]

It must, however, be pointed out that while the definition of the word "proved" in Section 3 does not make any distinction whatsoever between civil and criminal proceedings in the matter of proof of *facts* by either party, the final conclusion of the Court as to whether the plaintiff in a civil case or the prosecution in a criminal case has discharged the "burden of proof" depends on different standards of proof. The topic of burden of proof and standards of proof is discussed in Chapter XVIII.

"Disproved" and "Not Proved"

A fact is said to be "disproved", when, after the application of the tests mentioned above with regard to "proved", the Court comes to the conclusion that a fact does not exist, it is said to be disproved.

On the basis of the same criteria, if the Court is not in a position to decide whether a fact exists or does not exist, then the fact is said to be "not proved". So,

48 *Kundan Lal Rallaram v. Custodian. Evacuee Property. Bombay*. AIR 1961 SC 1316, para 7.
49 *Muralidhar @ Gidda & Anr. v. Karnataka*, (2014) 5 SCC 730 : AIR 2014 SC 2200.
50 *K. Ramaraj v. State*, 2014 (2) MLJ (Crl) 41 : 2014 (1) CTC 289.

the Evidence Act makes a distinction between "disproved" and "not proved" and both are not synonymous. While "proved" shows a state of certainty in the Court's mind about the existence of a fact, "disproved" shows a state of certainty about the non-existence of a fact. On the other hand, "not proved" exhibits a state of uncertainty where the Court is not in a position to conclude, because of the inadequacy of evidence, that either a fact exists or does not exist and it has an open mind on the matter. While that may be so as a general rule, at the conclusion of a criminal prosecution if the Court comes to the conclusion that the guilt is either "disproved" or "not proved", the outcome of uncertainty will be the acquittal of the accused. In *M. Krishnan v. The State through the Inspector of Police, District Crime Branch, Sivagangai, etc*,[51] the Division Bench of Madras High Court aptly observed:

> In civil law and service jurisprudence, there is a world of difference between 'not proved' and 'disproved'. In criminal jurisprudence, there is no distinction between these expressions namely 'not proved' and 'disproved', as both would result only in one consequence, namely acquittal.

KINDS OF EVIDENCE

MEANING OF EVIDENCE

What is "Evidence"?

The term 'evidence' is derived from the Latin root *evidere* which means "to show clearly; to ascertain; to prove". In *Kalyan Kumar Gogoi v. Ashutosh Agnihotri*,[52] the Supreme Court observed: "The word 'evidence' is used in common parlance in three different senses : (a) as equivalent to relevant (b) as equivalent to proof and (c) as equivalent to the material, on the basis of which courts come to a conclusion about the existence or non-existence of disputed facts." However, 'evidence' is not the same thing as 'proof' and a clear distinction must be drawn between the two terms. Evidence is the means and proof is the result.[53] Evidence is the tool by which proof is obtained. Thus, for instance, that A killed B can be 'proved' if there is testimony of witnesses who saw A kill B or other circumstantial evidence like their previous enmity (motive), finger prints etc from which it can be concluded that A killed B. Here the testimony of the witnesses and other circumstances are the evidence by which A's guilt can be proved.

Then, how is evidence defined? Some say that "'evidence' is the means of ascertaining the truth in a law suit".[54] Similarly, Taylor defines evidence as: "All legal means, exclusive of mere argument, which tend to prove or disprove any matter

51 *M. Krishnan v. The State through the Inspector of Police, District Crime Branch, Sivagangai, etc.*, 2014 (5) LW 798, para. 40.

52 *Kalyan Kumar Gogoi v. Ashutosh Agnihotri*, (2011) 2 SCC 532 : AIR 2011 SC 760 : (2011) 1 SCR 797.

53 Taylor says that proof refers to the "effect" of evidence than evidence itself. See, Pitt Taylor, *A Treatise on the Law of Evidence*, 11th edn, Joseph Bridges Mathews and George Frederick Spear, eds., vol.1 (London, 1920), p. 1.

54 See, for instance, William A. Rutter, *Evidence*, Gilbert Law Series, 10th edn (Gardena, California, 1977), p.1.

of fact, the truth of which is submitted to judicial investigation."[55] The use of the term 'truth' in this context can be very tricky. If a police officer is shot and killed by the terrorists at a traffic junction while going to his office in a car, and no witnesses are forthcoming to come to Court and depose or offer evidence against the killers for fear of harm to themselves, the accused will be acquitted by the Court as his guilt is not proved because of absence of evidence. Here the 'truth' is that the police officer was, indeed, killed by the terrorists but 'proof' is that they are found 'not guilty'. *Here, absence of evidence of guilt is not evidence of absence of guilt.* It may be contended that the plea of 'not guilty' by the accused is not an assertion of his innocence but merely a demand for proof of his guilt.[56] Just as the fact that the accused is finally acquitted by a Court of law may only mean that his guilt has not been proved to the satisfaction of the Court and may not in all cases mean that he is in fact innocent,[57] so also the fact that he is convicted does not invariably mean that he is in fact guilty and not innocent. As it is well said, "since law operates on facts, justice is contingent on factual truth."[58] Thus, there is a stark difference between 'real' truth and 'forensic'[59] truth. The hiatus between the 'real' truth and 'forensic' truth can, indeed, be troubling to judicial conscience and the Courts sometimes feel helpless. Thus, in a recent case of 2012[60] the Supreme Court, acquitting the appellant accused of rape, said:

> The demeanour of PW-2 Aruna, the tears in her eyes, her walking out of the court after looking at the appellant, pricks the judicial conscience. But convictions cannot be based on suspicion, conjectures and surmises. We are unable to come to a conclusion that the trial court's judgment is perverse. For want of legal evidence we will have to set aside the appellant's conviction and sentence. But we make it clear that we are doing so only by giving him benefit of doubt.

Forensic truth depends on the ability of a party to a suit or criminal proceeding to persuade the judge to come to the conclusion whether or not something is proved to his satisfaction on the basis of evidence admissible under the law. Though one speaks of something being proved by a party, in a true forensic sense a party can only adduce evidence and proof is determined by the Court, and in that sense all proof, whether of a particular fact or the entire case, is an adjudicatory outcome.[61] That is why Jeremy Bentham said: "What is proof? In the most extended signification..., it

55 See, Pitt Taylor, *A Treatise on the Law of Evidence*, 11th edn, Joseph Bridges Mathews and George Frederick Spear, eds., vol.1 (London, 1920), p. 1.

56 *R. v. Speed*, [2013] EWCA Crim 1650, para. 11.

57 This, of course, does not mean that *legally* the doubts regarding the guilt should persist and the accused should be denied the legal benefits of his acquittal. In *Sekanina v. Austria*, (1993) 17 EHRR 221, 235, para 30, where the Regional Court refused the Applicant's plea for compensation for unlawful detention after his acquittal by itself, the European Court of Human Rights observed: "the voicing of suspicions regarding an accused's innocence is conceivable as long as the conclusion of criminal proceedings has not resulted in a decision on the merits of the accusation. However, it is no longer admissible to rely on such suspicions once an acquittal has become final."

58 Ho Hock Lai, *A Philosophy of Evidence Law: Justice in Search for Truth*, (Oxford University Press, 2008, p. 5.

59 In Latin 'forum' means Court and 'forensic' means relating to Court.

60 *K. Venkateshwarlu v. Andhra Pradesh*, AIR 2012 SC 2955 : (2012) 8 SCC 73.

61 Ho Hock Lai says: "if by 'proof' we mean the proof of facts; it was, rather, the *adjudication* outcome". Ho Hock Lai, *A Philosophy of Evidence Law: Justice in Search for Truth*, (Oxford University Press, 2008), p. 5. (Emphasis in the original).

means a fact *supposed* to be true..."[62] The outcome of this process in a Court of law may not necessarily conform to the 'real' truth, however desirable it may be that it should so conform. The Scottish Law Commission stated:

> It is sometimes maintained that the object of leading evidence in a criminal trial is, or should be, the elucidation of the truth. That statement, however, requires considerable qualification. First, the matter to be elucidated is not the whole truth about all the circumstances of the events narrated in the libel, but only the question whether the Crown has proved beyond reasonable doubt that the accused committed the crime charged against him. While a verdict of "guilty" answers that question in the affirmative, a verdict of "not guilty" or "not proven" only means that that question has not been so answered: it is not a determination of the accused's innocence. And whatever the verdict, it may not reflect the truth.... It is rather a serious attempt to reach a conclusion on the question whether the accused's guilt has been proved beyond reasonable doubt,... In fact, however, the criminal trial is not an exercise in which the truth is pursued at all costs.[63]

Peter Murphy in his *Practical Guide to Evidence* refers to an anecdote: "A frustrated judge in an English adversarial court, after witnesses had produced conflicting accounts, finally asked a barrister, 'Am I never to hear the truth?' 'No, my lord', replied counsel, 'merely the evidence'."[64] Peter Murphy further observes:

> A judicial trial is not a search to ascertain the ultimate truth of the past events inquired into, but to establish that a version of what occurred has an acceptable probability of being correct. It is in the nature of human experience that it is impossible to ascertain the truth of past events with absolute certainty.[65]

The main constraints are:

1. Time and cost of litigation that limit the scope of a legal proceeding.
2. In Common Law system, the Courts themselves cannot search for relevant evidence but must reach their verdict solely on the basis of evidence adduced by the parties.
3. Law itself contains rules which exclude relevant evidence for a variety of reasons.[66]

The basic components of judicial process like principles of natural justice "make a difference" and the outcome can be very unexpected and upsetting. As Megarry J memorably stated in *John v. Rees*,[67]

> As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.

62 Jeremy Bentham, A Treatise on Judicial Evidence, Extracted from the Manuscripts of Jeremy Bentham, Esq. by M. Dupont (London, 1825), p.8. (Emphasis added.)
63 Scottish Law Commission, Evidence Report on Corroboration, Hearsay, and Related Matters in Civil Procedure (Report No. 100, 1986), p. 7, para. 2. 14-15.
64 Quoted in "Accuser or Inquisitor—In Search of Truth", available on http://lawpublications.barry.edu/cgi/viewcontent.cgi?article=1022&context=barrylrev (last accessed on 28th January, 2015). Peter Murphy's *Practical Guide to Evidence* was later published as *Evidence* referred to in the fn. 65 below.
65 Peter Murphy, *Murphy on Evidence* (Oxford, 2008), p.3.
66 Adrian Keane and Paul McKeown, *The Modern Law of Evidence*, 9th edn, (Oxford, 2012), Introduction, p.1ff.
67 *John v. Rees*, [1970] Ch 345, at p.402.

The technicalities of the rules of evidence have in fact led some eminent jurists like Bentham,[68] Salmond[69] and Cross[70] to deprecate the subject of law of evidence altogether.[71]

Some authors define 'evidence' in a manner relatable and confined to judicial proceedings. Thus Phipson defines 'evidence' as "the testimony, whether oral, documentary or real which may be legally received in order to prove or disprove some fact in dispute."[72] This definition does not concern itself with the value judgment of "finding or establishing the truth" but focuses on (a) what is legally admissible as evidence and (b) the objective of proving or disproving some fact on the basis of that evidence in a Court of law.[73] Salmond also says that "one fact is evidence of another when it tends in any degree to render the existence of the other fact probable."[74]

What is "Proof"?

As was discussed already, the term "Proved" is defined in Section 3 in terms of Court's belief and assessment of probability. Proof is a mental process by which one arrives at the conclusion that a fact exists or does not exist on the basis of evidence. Proof is different from mere faith or assumption. Proof depends on certain objective criteria on the basis of which one is persuaded to come to the conclusion that a fact exists. This is sometimes called "objective satisfaction". In contrast to this, "subjective satisfaction" means satisfaction of a person about the existence of something which is based, not on what are called "hard facts", but merely on his belief. It is like saying that "I believe that something exists because I think it exists". Thus, one can say very truthfully that he believes, for instance, in the existence of ghosts though he cannot prove their existence. Thus, proof depends on the mental process of assessing and appreciating certain facts or data by a person on the basis of which he is persuaded to arrive at a compelling conclusion. But, however objective one might try to be, the very human process of choice of particular facts as "relevant" and exclusion of certain other facts as "not relevant", "appreciation" and "assessment" of those facts and arriving at certain "conclusions" involve necessarily and inevitably a degree of subjectivity. In fact, Friedrich Nietzsche, the German

68 Jeremy Bentham found law of evidence to be "incompetent on every occasion to the discovery of truth, ...incompetent therefore, on every occasion, to the purposes of justice". Jeremy Bentham, *Rationale of Judicial Evidence*, in John Bowring (ed), The *Works of Jeremy Bentham*, Vol. 7 (Edinburgh: William Tait, 1843), p. 206.
69 Salmond, a former judge of the Supreme Court of New Zealand, says law of evidence is "one of the last refuges of legal formalism". John W. Salmond, *Jurisprudence or the Theory of the Law* (London: Stevens & Haynes, (1902), p. 597.
70 In September 1972, during a heated debate on reform of criminal evidence, Rupert Cross reportedly said: "I am working for the day that my subject is abolished". William Twining, "Address to Evidencers", *Secton Hall Law Review*, (2008), 38, 879-883, p. 881. Charles Dickens famously said: "'The law', they agree, 'is an ass'." *Oliver Twist*, (2000), Ware, Wordsworth eds., p 217.
71 But as Twining aptly says: "The equation of the subject with the rules of evidence was just the kind of rule-centered, doctrinal approach to law.... So the starting-point for inquiry was: what would one study about evidence in law if there were no rules?" Ibid.
72 Sydney L. Phipson, *Law of Evidence*, 10th edn, Michael V. Argyle, edn., (London, 1963), p. 2.
73 Best also defines evidence as: "The Evidence received by Courts of Justice in proof or disproof of *facts* the existence of which comes in question before them." William Mawdesley Best, Law of Evidence, 12th edn (London, 1922), p. 33.
74 Salmond on Jurisprudence, 12th edn,. P.J. Fitzerald, (London, 1966), p. 464.

philosopher, once said: "There are no facts, only interpretations."[75] Sir James Stephen observed: "Judicial decisions must proceed upon imperfect materials, and must be made at the risk of error."[76] Thus, the human and, hence the subjective, element does not permit of Euclidean certainty that makes one say that two plus two is always four.[77]

As Taylor[78] perceptively observes:

> None but the mathematical truth is susceptible of that high degree of evidence called demonstration, which excludes all possibility of error. In the investigation of matters of fact such evidence cannot be obtained; and the most that can be said is, that there is no reasonable doubt concerning them.

Echoing the same opinion, the Supreme Court observed:

> Proof does not mean proof to rigid mathematical demonstration, because that is impossible; it must mean such evidence as would induce a reasonable man to come to the conclusion.[79]

The apex Court said recently:

> The concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of degrees of probability and the quantum of proof.[80]

It is stated in The Encyclopedia Britannica:

> Probability which necessarily implies uncertainty, is a consequence of our ignorance....Thus, if the question were put, Is lead heavier than silver? some persons would think it is, but would not be surprised if they were wrong; others would say it is lighter; while to a worker in metals probability would be superseded by certainty.[81]

75 Friedrich Nietzsche, *Notebooks*, (Summer 1886 – Fall 1887), quoted in Walter Kaufmann, *The Portable Nietzsche*, (1954), p. 458.
76 Sir James Stephen, *The Indian Evidence Act: with an Introduction of the Principles of Judicial Evidence* (London, 1872), Macmillan Co., p. 28.
77 The Law Commission of India, in its 185th Report on Law of Evidence stated at p.25: "There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must rest on robust common sense and ultimately on the trained intuition of the Judge."
78 Taylor, *A Treatise on the Law of Evidence*, 11th edn, Joseph Bridges Mathews and George Frederick Spear, eds., Vol.1 (London, 1920),, p.1; Glanville Williams says "the simple multiplication rule does not apply..." Glanville Williams, "The Mathematics of proof –II", Criminal Law review, 1979, p. 342.
79 *Inder Singh v. State (Delhi Administration)*, AIR 1978 SC 1091. Also *per* Fletcher Moulton L.J. in *Hawkins v. Powells Tillery Steel Coal Co. Ltd*, . 1911(1) KB 988.
80 Per Dr. Arjit Pasayat J., in *Chhotanney v.Orissa*, AIR 2009 SC 2013, at p. 2015, para. 10.
81 Thomas Spencer Baynes' article on "Probability and Statistics" in The Encyclopaedia Britannica: a dictionary of arts, sciences, Vol. 19, 9th edn, (New York, 1888). Interestingly, it is said: "Probability has its origin in the study of gambling and insurance in the 17th century, and it is now an indispensable tool of both social and natural sciences." Theodore M. Porter, "Probability and Statistics" in http://www.britannica.com/EBchecked/topic/477493/probability-and-statistics (last accessed on 28th January, 2015). Attempts have been made to model the legal notion of proof and reasoning with statistical tools. For instance, Thomas Bayes' famous 'theorem' as a solution to a problem of "inverse probability" was presented in *An Essay towards solving a Problem in the Doctrine of Chances* which was read to the Royal Society in 1763 and after Bayes's death, Richard Price reorganized the work through his presentation and its publication in the *Philosophical Transactions of the Royal Society of London* the following year. An example of its application is: "Suppose someone told you he had a nice conversation with someone on the train. Not knowing anything else about this conversation, the probability that he was speaking to a woman is 50%. Now

[Footnote 81 Contd.]

It was this relativity and subjectivity of human evaluation and the need for humility that prompted Justice Robert H. Jackson to make his famous observation about United States Supreme Court in *Brown v. Allen*:[82]

> *Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that, if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed.* We are not final because we are infallible, but we are infallible only because we are final.[83]

Definition of Evidence

Section 3 of the Evidence Act defines "Evidence" as follows:

> "Evidence" means and includes—
>
> (1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;
>
> such statements are called oral evidence.
>
> (2) [84][all documents including electronic records produced for the inspection of the Court;]
>
> such documents are called documentary evidence.

From the above definition it is clear that evidence 'means and includes' two categories:

(1) Oral evidence which consists of (a) 'statements' (b) made by 'witnesses' (c) in the 'Court' (d) in relation to (e) 'matters of fact' (f) under enquiry; and

(2) Documentary evidence which consists of (a) documents (b) including electronic records (c) produced (d) for the inspection of the Court.[85]

The crucial question is: Is the definition of the term under Section 3 an exhaustive one? In *Hardeep Singh v. Punjab & Ors*,[86] the Supreme Court has held that "the definition of word 'evidence' under the Evidence Act is exhaustive" which means

[Footnote 81 Contd.]

suppose he also told you that that person had long hair. It is now more likely he was speaking to a woman, since women are more likely to have long hair than men. Bayes' theorem can be used to calculate the probability that the person is a woman." The statistical approach has been opposed as unreliable for not being case-specific etc. Thus, in the above example, the other person could in fact be a man and not a woman. Richard Lempert, "The New Evidence Scholarship: Analyzing the Process of Proof", Boston University Law Review (1986), Vol. 66, p. 439; Adrian A.S. Zuckerman, "Law, Fact or Justice?" Boston University of Law Review (1986), Vol. 66, p.487ff; Marcello Di Bello, "Statistical Evidence in Criminal Trials: What is Wrong with it?" (Last update: 30th October, 2012) http://paperzz.com/doc/1741523/statistical-evidence-in-criminal-trials--what-is—marcel (last accessed on 28th January, 2015).
82 *Brown v. Allen*, 344 U.S. 443 (1953).
83 Emphasis added.
84 Substituted by Information Technology Act, 2002 (21 of 2000), Section 92 and Second Schedule (w.e.f. 17-10-2000), for the words "all documents produced for the inspection of the Court"
85 See the discussion under Section 118 for the detailed explanation of some of these terms.
86 *Hardeep Singh v. Punjab & Ors*, 2014 (III) MPRJ (SC) 1.

that there are no categories other than oral and documentary evidence. However, in *Kalyan Kumar Gogoi* v. *Ashutosh Agnihotri & Anr.*,[87] the Supreme Court observed:

> Though, in the definition of the word "evidence" given in Section 3 of the Evidence Act one finds only oral and documentary evidence, this word is also used in phrases such as best evidence, circumstantial evidence, corroborative evidence, derivative evidence, direct evidence, documentary evidence, hearsay evidence, indirect evidence, oral evidence, original evidence, presumptive evidence, primary evidence, real evidence, secondary evidence, substantive evidence, testimonial evidence, etc.

But it is clear from the use of the term "includes" in the section that it is only an inclusive definition and not an exhaustive definition of "evidence". One important kind of evidence that the section does not expressly mention is what is called "material", "real" or "objects" evidence that refers to things like knives and pistols that may be adduced in evidence. Material evidence is neither oral nor documentary. Sir James Stephen explained the reason for the omission of this category and stated:

> A third class might be formed of things produced in court, not being documents, such as the instruments with which a crime was committed, or the property to which damage had been done, but this division would introduce needless intricacy into the matter. The reason for distinguishing between oral and documentary evidence is that in many cases the existence of the latter excludes the employment of the former; but the condition of material things, other than documents, is usually proved by oral evidence, so that there is no occasion to distinguish between oral and material evidence.[88]

Then the criticism would be that even documents are also proved by oral evidence. To that Sir Stephen's reply was:

> It may be said that in strictness all evidence is oral, as documents or other material things must be identified by oral evidence before the court can take notice of them. It is unnecessary to discuss the justice of this criticism, as the phrase 'documentary evidence' is not ambiguous, and is convenient and in common use.[89]

Whatever may be "the needless intricacy" arising out of the mention of the category of material evidence, the fact is that the category would remain in any case. That was why he preferred to refer to material objects in Section 60 in the context of the production of objects to which oral evidence relates. It is obvious that at the time of drafting of the Evidence Act, guns and bullets were not in vogue as widely as now and more modern electronic and other gadgets were unknown as tools and instruments of crime. In the present global crime scenario, material or real evidence cannot be viewed any more merely as the objects or things, on par with papers documents, to which oral evidence relates, but should be treated as an independent third category of evidence because of its critical importance and be brought under the rubric of inclusive definition of "evidence" under Section 3.

Apart from the above, the Chapter on relevancy of the Evidence Act declares certain "facts" as relevant under its sections such as 'dying declaration' under Section 32(1) and confession of the co-accused under Section 30 which do not fall within the scope of the two categories of Section 3. Those facts can be relevant only

87 *Kalyan Kumar Gogoi* v. *Ashutosh Agnihotri & Anr.*, AIR 2011 SC 760 : (2011) 2 SCC 532.
88 Sir James Fitzjames Stephen, The Indian Evidence Act: With an Introduction of the Principles of Judicial Evidence (London, 1872), Macmillan Co., p. 11.
89 Ibid.

as evidence. The Criminal Procedure Code also declares that reports of Government experts "may be used as evidence" (Section 293), affidavits of formal character "may be read in evidence" (Section 296) and statements recorded by a Magistrate (Section 164) may be sent to the Magistrate trying the case and so on. Section 14 of the Family Courts Act, 1984, provides:

> **S. 14. Application of Indian Evidence Act, 1872.**—A Family Court may receive as evidence any report, statement, documents, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872 (1 of 1872).

Under the above provision Family Court "may receive as evidence", for instance, reports of experts on DNA profiling "whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act." In *Kunhiraman v. Manoj*,[90] the trial Court called for, received and relied upon a DNA report from CCMB, Hyderabad, confirming paternity and this verdict was affirmed by the Kerala High Court.

In *Boraiah Alias Shekar v. State*,[91] Karnataka High Court held:

> It is clear to us that the words, reading, using, receiving, giving or admitting in evidence cannot but have the same meaning and import.... The phrase 'read in evidence' means read as substantive evidence, which is the evidence adduced to prove a fact in issue...

Hence, evidence is evidence if the Evidence Act or the Procedural Codes or other statutes declare certain facts as evidence, and evidence does not lose its intrinsic character whatever may be the degree of its reliability. Though, for instance, Section 60 mandates with great repetitive emphasis that oral evidence, '*must*', '*in all cases*', '*whatever*' be direct, Evidence Act itself provides for many exceptions to that 'hearsay rule' by way of admissions, confessions, dying declarations etc. The distinction between 'direct' and 'hearsay' oral evidence and 'primary' and 'secondary' documentary evidence is related not to the definition but based on the Best Evidence Rule that the probative value of evidence of the former in both the categories is considered higher than the latter. Similarly, the distinction between 'substantive' and 'corroborative' evidence relates to the use that evidence is put to by the Court but not to the definition of evidence itself. It may be borne in mind that these terms and distinctions are not common parlance usages but part of forensic terminological usage. Some categories which are universally accepted for more than a century like 'hearsay' and 'circumstantial' evidence do not occur anywhere in the Evidence Act. Hence, it is submitted, with respect, that a restrictive interpretation of "evidence" in Section 3 is unwarranted and counter-productive, and that dying declarations, confessions, admissions, accomplice's evidence, confession of the co-accused, Sections 162 and 164 CrPC statements etc should all be considered as species of the "inclusive" definition of "evidence" in Section 3. Some of them may be generic but are not non-technical terms.[92] Some of them may be relevant and admissible at the threshold level, and some may become admissible on the fulfillment of certain

90 *Kunhiraman v. Manoj*, II (1991) DMC 499.
91 *Boraiah Alias Shekar v. State*, 2003 (1) ALD Cri 951 : 2003 Cri LJ 1031.
92 In *Hari Charan Kurmi and Jogia Hajam v. Bihar*, AIR 1964 SC 1184 : 1964 Cri LJ 344 with reference to accomplice's evidence (Section 133) and the confession of a co-accused (Section 30) Gajendragadkar C.J., speaking for a Constitution Bench said that the confession of the co-accused was evidence in a "generic" but not in "technical" sense.

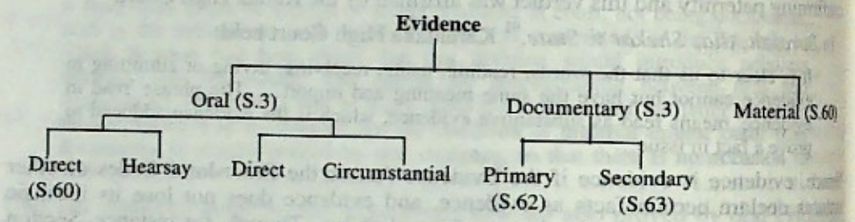
conditions. Legal policy issues of relevancy and admissibility and probative value should not detract from the definitional scope of the term "evidence". Hence, "oral" and "documentary" evidence defined in Section 3 should be taken not as the only or exclusive categories of evidence but as typical and inclusive categories. Otherwise, legal fraternity will be left with the untenable option of treating material objects, confessions of accused and a host of other critical evidence as no "evidence" at all within the meaning of Section 3.

Substantive and Corroborative Evidence

The above important distinction is discussed under Sections 145 and 157 in Chapter XXIII.

CLASSIFICATION OF EVIDENCE

Evidence may be classified as follows:[93]



Oral Evidence

Section 59 states that "All facts, except the contents of documents, may be proved by oral evidence" and, as stated above, Section 3 defines "oral" evidence as: "All statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence." The ingredients of this definition are that Oral evidence:

(a) consists of "statements"

(b) made in a Court of law

(c) by witnesses

"Witness"

The term witness is not defined anywhere in the Evidence Act. From the above definition it is clear that, under the Evidence Act, a witness is a person who is called upon to give evidence in a Court of law. The statements made outside the Court are not strictly oral evidence. The topic of definition of witness is discussed in detail under Section 118.

93 This is based on the classification made by James Fitzjames Stephen himself. See, Select Committee First Report, quoted in Chitaley and S. Appu Rao, The Indian Evidence Act, Corpus Juris of India, Vol. 1 (Nagpur, 1956), p. Unnumbered (After Contents).

(1) Direct and Hearsay Evidence[1]

Distinction

The first classification of oral evidence mentioned above is Direct and Hearsay evidence.[2] Section 60 deals with direct evidence and requires that oral evidence about any fact must be given by witnesses who themselves have seen, heard or perceived by other senses (like smell, touch, taste etc) and not by those who heard about it from somebody else.[3] As the law relating to the hearsay rule is entirely based on the English Common Law, it will be useful to study the vicissitudes that the rule has gone through in England and other Common Law countries. The distinction between hearsay and original evidence was stated by Lord Wilberforce in *Ratten v. R*[4] as follows:

> The mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called, is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on 'testimonially', *i.e.*, as establishing some fact narrated by the words

Section 4 of the New Zealand Evidence Act of 2006 defines "hearsay statement" as meaning "a statement that—(a) was made by a person other than a witness; and (b) is offered in evidence at the proceeding to prove the truth of its contents." In other words, the truthfulness of a statement is sought to be proved through a witness who was not the person who made the statement. For instance, if C has made a statement that he has seen A killing B, C would be the proper person to testify in a Court of law that he made the statement and that what he said is true but if, instead of C, D is called as a witness to prove that C made the statement and that what C said is true, D's testimony will be hearsay. In fact, Sir James Stephen said: "…the word 'hearsay' is nearly, if not quite, equivalent to 'irrelevant'."[5] As Supreme Court observed, "direct evidence is sometimes referred to as 'original evidence' and hearsay evidence is referred to as 'indirect or derivative evidence'".[6]

1 See also the discussion under Section 60, *infra*.

2 It is said that "The term 'hearsay' is misleading since the rule applies not only to statements made orally but also to statements made in documents and to statements made by means of conduct such as signs or gestures." Scottish Law Commission, Evidence Report on Corroboration, Hearsay, and Related Matters in Civil Procedure (Report No. 100, 1986), p. 14, para. 3. 2.

3 For a study of the history of development and rationale of the Hearsay Rule, see The Law Commission of England and Wales, Consultation Paper on *Evidence in Criminal Proceedings*: The *Hearsay Rule and Related Topics*, No 138 (1995), and Report on *Evidence in Criminal Proceedings: Hearsay and Related Topics*, 1997, http://lawcommission.justice.gov.uk/docs/ lc245_evidence_in_criminal_proceedings_hearsay_and_related_topics.pdf (last accessed on 28th January, 2015); Law Reform Commission [Ireland], Consultation Paper on *Hearsay in Civil and Criminal Cases*, March 2010(LRC CP 60 - 2010), Chapter I; and Hong Kong Law Reforms Commission Consultation Paper on *Hearsay in Criminal Proceedings*, 2005, and Report on *Hearsay in Criminal Proceedings*, 2009, *http://www.hkreform.gov.hk/en/publications/chronological.htm#2005* (last accessed on 28th January, 2015).

4 *Ratten v. R*, [1972] AC 378, at p.387.

5 Sir James Stephen, *The Indian Evidence Act: with an Introduction of the Principles of Judicial Evidence* (London, 1872), Macmillan Co., p. 5.

6 *Awadh Bihari v. Madhya Pradesh*, AIR 1958 SC 738. In this sense, an electronic document would involve what is stored in digital form in a computer or its printout. A printout of what is recorded originally in a computer in digital form is either hearsay or secondary evidence.

Kinds of Hearsay

(a) Express Hearsay and Implied Hearsay

Sometimes a distinction is made between "express hearsay" and "implied hearsay" (a) "I am calling Mr. X because he sells drugs" (express) and (b) I am calling Mr. X because I want to buy drugs from him" (implied) and the import of both the statements is same *i.e.*, Mr. X sells drugs. Here, what is sought to be proved is not that a call was, in fact, made, but that Mr. X is a drug peddler. Giving this example in its landmark decision on hearsay evidence in *R. v. Baldree*,[7] the Supreme Court of Canada said that "there is no principled or meaningful distinction" between them and the same exclusionary rules apply equally to both of the out of Court hearsay statements.[8]

(b) Individual and Composite Hearsay

Hearsay is also classified into (a) Individual Hearsay and (b) Composite Hearsay. Where A testifies about B's statements, it is individual hearsay and where he testifies about what a group of individuals have said, it is composite hearsay.[9] Illustration (a) to Section 32 is an example of Composite Hearsay and says that the remarks of a crowd of individuals about the libelous character of a caricature are admissible under Section 32. See also the discussion under Section 32(8) *infra.*

Hearsay Rule

Sir James Stephen observed that a witness who testifies in a Court of law might be (1) telling the truth, or (2) be mistaken or (3) uttering falsehood, and if he is a direct witness he can be assessed by the judge.[10] In *R. v. Youvarajah,*[11] the Supreme Court of Canada observed: "Hearsay evidence — an out-of-court statement tendered for the truth of its contents — is presumptively inadmissible" and

> The law has conventionally favoured the evidence of witnesses who give evidence in court because they can be observed, under oath or affirmation, and their credibility and reliability can be tested by cross-examination.

Thus, the reasons for preferring direct evidence and rejecting hearsay evidence are:

- Direct evidence is first hand information and is trustworthy whereas hearsay is second hand and unreliable.
- Direct evidence is original and hearsay is derivative evidence.
- Even if the witness giving hearsay is speaking the truth that X told him, X himself may be telling falsehood but as X is not the witness he is not on oath and cannot be cross-examined.
- Direct witness owns responsibility for what he deposes but the witness giving hearsay passes the buck to the person from whom he derived his information.

7 *R. v. Baldree*, 2013 SCC 35.
8 This distinction is by no means a recent development as is evident from *Wright v. Tatham*, Eng.Rep. 488 Exch.Ch.1837 referred to below at fn. 62.
9 Basu's Law of Evidence, 6th edn., by P.M. Bakshi,., (New Delhi, 1998), Vol.2, p.1109.
10 Sir James Stephen, *The Indian Evidence Act: With an Introduction of the Principles of Judicial Evidence* (London, 1872), Macmillan Co., p. 39.
11 *R. v. Youvarajah,* 2013 SCC 41, para. 18.

- Oath administered to direct witness carries some sanctity in that he undertakes to speak the truth about what he deposed. A witness giving hearsay can swear only to what some other person told him but cannot vouchsafe for its truth.
- Direct witness is liable for perjury if he speaks falsehood about what he testified but the witness giving hearsay cannot be held for perjury as pleads ignorance about the truth or otherwise of what he says.
- While direct witness can be properly cross-examined, witness giving hearsay cannot be, in the nature of the things.[12]

Hence, between direct and hearsay evidence, law prefers the former and, as a rule, rejects the latter. The Supreme Court of United Kingdom observed in *R v. Horncastle and others (Appellants) (on appeal from the Court of Appeal Criminal Division)*:[13]

> Hearsay evidence is any statement of fact other than one made, of his own knowledge, by a witness in the course of oral testimony… There were two principal reasons for excluding hearsay evidence. The first was that it was potentially unreliable. It might even be fabricated by the witness giving evidence of what he alleged he had been told by another.[14] Quite apart from this, the weight to be given to such evidence was less easy to appraise than that of evidence delivered by a witness face to face with the defendant and subject to testing by cross-examination.[15]

In the recent decision in *R v. Riat and others*,[16] the Court of Appeals in England clarified the *Horncastle* decision and held that *Horncastle* did not lay down any general rule that hearsay evidence must be shown to be reliable before it can be admitted but the Court has to scrutinize, as per the provisions of Criminal Justice Act

12 In *R. v. Baldree*, 2013 SCC 35, para. 32, referred to above in the text, the Supreme Court of Canada pointing out the drawbacks of hearsay, observed: "First, the declarant may have *misperceived* the facts to which the hearsay statement relates; second, even if correctly perceived, the relevant facts may have been *wrongly remembered*; third, the declarant may have narrated the relevant facts in an *unintentionally misleading manner*; and finally, the declarant may have *knowingly made a false assertion.* The opportunity to fully probe these potential sources of error arises only if the declarant is present in court and subject to cross-examination." (Emphasis in the original). In *Teper v. R.* [1952] 2 All ER 447 at p.449, Lord Normand said: "It [the hearsay evidence] is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross examination, and the light which his demeanour would throw on his testimony is lost". See also, *Kalyan Kumar Gogoi v. Ashutosh Agnihotri and Another*, [2011] 1 SCR 797, at p. 822, paras. 21and 22.
13 *R v. Horncastle and others (Appellants) (on appeal from the Court of Appeal Criminal Division)*, [2009] UKSC 14.
14 Recently in *Stoutt v. The Queen*, (appeal from Court of Appeal of Virgin Islands), [2014] UKPC 14, paras. 17, 29, the Privy Council held: "Whilst hearsay evidence potentially suffers from the twin weaknesses that (i) what the witness says may be misreported and (ii) what he says may be in error (deliberately or otherwise), it may nevertheless sometimes be strong evidence.....But it always suffers from the disadvantage that the jury cannot see the source of it and cannot see his accuracy tested."
15 Ibid., paras. 20-21.The Court also observed: "More significant changes were made to the hearsay rule in criminal proceedings by the Criminal Justice Act [CJA] 1988, but these have been replaced by provisions of the CJA 2003. These provisions, particularly Chapter 2 of Part 11 of the CJA 2003, largely implemented the recommendations of the Report of the Law Commission dated 4th April, 1997 (Law Com No 245) on 'Evidence in Criminal Proceedings: Hearsay and Related Topics'. In 1995 the Law Commission had published a Consultation Paper on these topics, in response to a recommendation as to the need for reform made by a Royal Commission on Criminal Justice in 1993."
16 *R v. Riat and others*, [2012] EWCA Crim 1509.

(CJA), 2003, whether, *inter alia*, "Is there a specific 'interests of justice' test at the admissibility stage?"

The Best Evidence Rule: Court—Sentinel on the qui vive

The hoary principle which is the hub and fulcrum of the Law of Evidence is that the best possible evidence only must be considered by the Courts in the adjudication of disputes. This principle contains two different but related notions:

1. Only those facts with high probative value should be considered as "best" evidence; and
2. Those facts with high probative value must be proved by the "best" possible method.

The first principle relates to relevancy of facts and the second principle refers to mode of proof of those relevant facts. These two notions that ought to be kept distinct and separate are often conflated in the context of the Best Evidence rule. Chief Justice Holt propounded the Best Evidence Rule in *Ford v. Hopkins*[17] and stated: "The *best proof* that the nature of the thing will afford only is required." Sir James Stephen stated: "The rule which requires that the *best evidence* of which a fact is susceptible should be given, is the most distinct of the rules..."[18] While Sir Stephen was speaking of best "evidence", Holt CJ was speaking of best "proof". The Supreme Court of India recently observed that "the idea of best evidence is implicit in the Evidence Act"[19] as Section 60 requires oral evidence to be direct in all cases whatever, and Section 64 requires that documents must be proved, as a rule, by primary evidence. The Supreme Court of United Kingdom observed recently: "Jury trials are presided over by a judge who acts as gatekeeper as to what is and what is not permitted to be placed before the jury as evidence. This is an important safeguard for the defendant. The basic principle is that only the 'best' evidence is placed before the jury, that is, the evidence that is most likely to be reliable."[20] Phipson says: "The maxim that 'the best evidence must be given of which the nature of the case permits' has often been regarded as expressing the great fundamental principle upon which the law of evidence depends."[21] The principle means that the evidence with highest intrinsic probative value should always be preferred. As applied to oral evidence, the principle would mean that direct evidence should be preferred to hearsay, and as applied to documentary evidence the principle would mean that primary evidence should be preferred to secondary evidence. The Best Evidence Rule is also applied in the context of relevancy of facts so as to require that law of evidence should pick up only those logically relevant facts with high probative value and declare them as legally relevant. The head note of Section 136 of the Evidence Act mandates: "Judge to decide as to admissibility of evidence" and makes the Court the gatekeeper—the sentinel on the *qui vive*.

17 *Ford v. Hopkins*, 1 Salk. 283 (1701).
18 Sir James Stephen, *The Indian Evidence Act: With an Introduction of the Principles of Judicial Evidence* (London, 1872), Macmillan Co., p.5.(Emphasis added).
19 *Kalyan Kumar Gogoi v. Ashutosh Agnihotri and Another*, [2011] 1 SCR 797, at p. 821, para. 18.
20 *R v. Horncastle and others (Appellants) (on appeal from the Court of Appeal Criminal Division) (2009)*, [2009] UKSC 14.
21 Phipson, n. 56 below, p. 37.

"Demise" of Best Evidence rule in England?

However, the rule excluding hearsay evidence has been criticized by legal fraternity on the ground that the rule is too strict and inflexible, and excludes hearsay evidence even if it is cogent and reliable.[22] This proposition requires elucidation:

1. The Best Evidence rule ensures that only those facts which have high probative value are declared as relevant.
2. Facts relevant under (1) above are those (a) which are not barred by the exclusionary rules and (b) which come under the exceptions to the hearsay rule as applied to both oral and documentary evidence.
3. The Best Evidence rule also ensures that the relevant facts are proved by the best method possible—by direct oral evidence and primary documentary evidence.
4. The emerging fourth dimension to the Best Evidence rule is that there may be facts which are hearsay according to the above traditional rules but which according to the Court trying the case have a degree of reliability that the Court ought to take into consideration to secure ends of justice in the case.

In *Myers v. DPP*,[23] Lord Reid observed that the hearsay rule was "absurdly technical" and that "it is difficult to make any general statement about the law of hearsay which is entirely accurate." In the landmark judgment in *R. v. Youvarajah*,[24] the Supreme Court of Canada observed:

> Over time, however, the law has recognized that in certain circumstances, it may be safe to rely on out-of-court statements for the truth of their contents. Exceptions to the hearsay rule developed for statements carrying certain guarantees of inherent trustworthiness, often because of the circumstances in which they were made (for example, dying declarations and declarations that are adverse in interest). In addition to the traditional exceptions, however, this Court developed a principled approach that permits trial judges to admit hearsay evidence if it meets the twin threshold requirements of necessity and reliability. This is a flexible case-by-case examination.

In *R. v. Governor of Pentonville Prison, ex parte Osman*,[25] the Court of Appeal of England said that it would be "more than happy to say goodbye to the best evidence rule" and that though "the little loved best evidence rule has been dying for some time the recent authorities suggest that it is not quite dead".

In *R. v. Wayte*,[26] Beldam J., pointed out that "it is now well established that any application of the best evidence rule is confined to cases in which it can be shown that the party has the original and could produce it but does not" and that "the party has the original" meant only "a party who has the original of the document with him in court, or could have it in court without any difficulty." It is said that "the best evidence rule is... now applied so rarely as to be virtually extinct"[27] and that "even in

22 See, The Law Reform Commission of Hong Kong, Hearsay in Criminal Proceedings, Sub-Committee Consultation Paper on Hearsay in Criminal Proceedings, November 2005, http://www.hkreform.gov.hk/en/docs/crimhearsaye.pdf, para. 10ff (last accessed on 28th January, 2015).
23 *Myers v. DPP*, [1965] AC 1001, at pp. 1019-20.
24 *R. v. Youvarajah*, 2013 SCC 41, paras. 20, 21.
25 *R. v. Governor of Pentonville Prison, ex parte Osman*, [1990] 1 WLR 277.
26 *R. v. Wayte*, (1983) 76 Cr. App. Rep. 110, at pp.116-7.
27 J.H.A. Macdonald, *A Practical Treatise on the Criminal Law of Scotland*, 5th edn (Edinburgh, 1948), p 317.

its heyday, the best evidence rule was not an absolute rule; its application depended on the particular circumstances of each case" and that it "is no more than a rule of practice to the effect that the court would attach no weight to secondary evidence of the contents of a document unless the party seeking to adduce such evidence had first accounted to the satisfaction of the court for the non-production of the document itself."[28]

U.K. 'Abolishes' Common Law Rules of Best Evidence

It will be useful to examine the extent to which the Common Law relating to Best Evidence rules is abolished in England with regard to:

1. Oral evidence in
   (A) civil and (B) criminal proceedings
2. Documentary evidence in
   (A) civil and (B) criminal proceedings

(1) Oral Evidence—Common Law Hearsay Rule

During the last two decades, the legal fraternity in England expressed the opinion that it is time to abolish the Common Law Rule of Hearsay. It is said that while, on the one hand, the rule barred hearsay evidence, too many exceptions have come to be grafted to the rule making it needlessly complex and cumbersome. In *Ventouris v. Mountain (No.2)*,[29] Balcombe LJ., observed: "...the modern tendency in civil proceedings is to admit all relevant evidence and the judge should be trusted to give only proper weight to evidence which is not the best evidence." In 1991, the Law Commission of England recommended the abolition of the rule excluding hearsay but subject to certain safeguards. It was thought that hearsay rule should be related not to admissibility but to the weight to be given to evidence.[30] The Law Commission in 1993 mentioned "...the first guiding principle which we have adopted *i.e.*, that all relevant evidence should be admissible unless there is good reason for it to be treated as inadmissible" and "...we believe that the fact that it is hearsay should no longer be a ground for making it *prima facie* inadmissible."[31] Hence, the Law Commission recommended the repeal of Part I of the Civil Evidence Act of 1968 which dealt with hearsay rules.[32] The proposed repeal was accordingly effected and the Civil Evidence Act of 1995 was passed.

(A) Civil Proceedings

Section 1 of Civil Evidence Act 1995 provides: "(1) In civil proceedings evidence shall not be excluded on the ground that it is hearsay."

28 *Per* Lord Parker in *Masquerade Music Ltd & Ors v. Springsteen*, [2001] EWCA Civ 513, paras. 65-77.
29 *Ventouris v. Mountain (No.2)*, [1992] 1 WLR 887, p. 899.
30 Consultation Paper (The Hearsay Rule in Civil Proceedings (1991), Consultation Paper No. 117.) Earlier similar recommendation was made by Scottish Law Commission, Evidence Report on Corroboration, Hearsay, and Related Matters in Civil Procedure (Report No. 100, 1986).
31 The Law Commission, The Hearsay Rule in Civil Proceedings, September 1993 (C. 2321), London, p. 24, para. 4. 5.
32 Ibid., p. 2, para. 1. 8.

Clause (2) of Section 1 lays down:

S. 1. Admissibility of hearsay evidence.—* * *

(2) In this Act—

(a) "hearsay" means a statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matters stated; and

(b) references to hearsay include hearsay of whatever degree.

(3) Nothing in this Act affects the admissibility of evidence admissible apart from this section.

(4) The provisions of sections 2 to 6 (safeguards and supplementary provisions relating to hearsay evidence) do not apply in relation to hearsay evidence admissible apart from this section, notwithstanding that it may also be admissible by virtue of this section.

In Section 1(2)(b) above "hearsay of whatever degree" means that even hearsay of hearsay or what is called 'second hand hearsay' is now admissible: For instance, A told me that B told him that he killed C.

Section 7 lays down that the Common Law hearsay rules relating to public documents, published works of a public nature and public records, and good and bad character, reputation or family tradition etc are preserved. One important factor of this reform of Common Law hearsay rules is that the 1995 Act shifts the focus from the admissibility of evidence to its reliability and, by so doing, gives greater flexibility to the parties and confers greater discretion on the Courts in admitting hearsay and the weight to be given to it.

Consequently, five years later, in *Masquerade Music Ltd & Ors v. Springsteen*,[33] Lord Parker dealing with a case of proof of documents by secondary evidence, announced the demise of the Best Evidence rule in England, stated:

> In my judgment, the time has now come when it can be said with confidence that the best evidence rule, long on its deathbed, has finally expired.

(B) Criminal Proceedings[34]

The Criminal Justice Act of 2003 adopts an approach different from the Civil Evidence Act of 1995. The latter Act states the general principle as "in civil proceedings evidence shall not be excluded on the ground that it is hearsay" and then proceeds to state the Common Law rules which are "preserved". Section 118 of the Criminal Justice Act of 2003 of U.K. dealing with "Preservation of certain common law categories of admissibility" provides in Clause (2) that "with the exception of the rules preserved by this section, the common law rules governing the admissibility of hearsay evidence in criminal proceedings are abolished." Section 114 of the Act contains an overriding provision and states: "(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if: (a) any provision of this Chapter or any other statutory provision makes it admissible, (b) any rule of law preserved by Section 118 makes it

33 *Masquerade Music Ltd & Ors v. Springsteen*, [2001] EWCA Civ 513, para. 85. It is interesting to note that under Section 114 hearsay evidence can be admitted if "all parties to the proceedings agree" or "the court is satisfied that it is in the interests of justice"—in other words, party autonomy or Court's discretion.See, *Sliogeris v. R.*, [2015] EWCA Crim 22, para. 15.
34 J.R. Spencer, Hearsay Evidence in Criminal Proceedings (Oxford, 2008).

admissible, (c) all parties to the proceedings agree to it being admissible, or (d) the court is satisfied that it is in the interests of justice for it to be admissible." It is interesting to note that under Section 114 hearsay evidence can be admitted if "all parties to the proceedings agree" or "the court is satisfied that it is in the interests of justice"—in other words, party autonomy or Court's discretion.

Section 118 states in Clause (1) that "the following rules of law are preserved" and mentions the following categories:

1. Public information etc.
2. Reputation as to character[35]
3. Reputation or family tradition
4. *Res gestae*[36]
5. Confessions etc
6. Admissions by agents etc.
7. Common enterprise[37]
8. Expert evidence

Traditionally, the accused is granted various procedural safeguards in U.K. and, hence, while the Criminal Justice Act bars all hearsay except in some cases, the Civil Evidence Act permits all hearsay except the barring rules which are preserved.

Appraisal

The pronouncement that the Common Law rules of hearsay relating to oral evidence are dead and buried appears to be rather hasty. In the recent decision in *R v. Riat and others*,[38] (2012) Lord Hughes made the legal position very clear:

> The common law prohibition on the admission of hearsay evidence remains the default rule but the categories of hearsay which may be admitted are widened. It is essential to remember that although hearsay is thereby made admissible in more circumstances than it previously was, this does not make it the same as first-hand evidence. It is not. It is necessarily second-hand and for that reason very often second-best. Because it is second-hand, it is that much more difficult to test and assess. The jury frequently never sees the person whose word is being relied upon. Even if there is a video recording of the witness' interview, that person cannot be asked a single exploratory or challenging question about what is said. From the point of view of a defendant, the loss of the ability to confront one's accusers is an important disadvantage. Those very real risks of hearsay evidence, which underlay the common law rule generally excluding it, remain critical to its management. Sometimes it is necessary in the interests of justice for it to be admitted. It may not suffer from the risks of unreliability which often attend such evidence, or its reliability can realistically be assessed. Equally, however, sometimes it is necessary in the interests of justice either that it should not be admitted at all, or that a trial depending upon it should not be allowed to proceed to the jury because any conviction would not be safe.

In *R. v. Ibrahim*,[39] Aikens L.J. laid down four tests for admitting hearsay statements: "(a) was there justification for admitting the untested hearsay (b) how important were the statements (c) how demonstrably reliable were they and (d) were the counter-

35 See the discussion under Section 54 on U.K. practice.
36 See the discussion under Section 6 on U.K. practice.
37 See the discussion under Section 10 on U.K. practice.
38 *R v. Riat and others*, [2012] EWCA Crim 1509, para. 3.
39 *R. v. Ibrahim*, [2012] EWCA Crim 837.

balancing measures inherent in common law properly applied to ensure a fair trial."[40] In the more recent case of *Regina v. Shabir*,[41] the Court of Appeal (Crim), after referring to the above decisions, observed that under Section 116(2)(e) of CJA where the witness fails to give evidence because of fear, and hearsay evidence of his statement is sought to be adduced, "a causative link between the fear and the failure or refusal to give evidence must be proved" and "the more central the evidence that is sought to be admitted as hearsay evidence is to the case, the greater the scrutiny that has to be undertaken to see whether or not it should be admitted as hearsay."[42]

The traditional rule excluding prior inconsistent out-of-Court statements for proving the truth of what they state was altered in Canada in *R. v. B. (K.G.)*,[43] to conform with the evolving "principled approach" to hearsay. On an exceptional basis, a prior inconsistent statement is admissible, not only for corroboration, but also for the truth of its contents, provided the threshold criteria of necessity and reliability are established.[44] In *R. v. Baldree*,[45] the Supreme Court of Canada said: "the indicia of necessity and reliability…might otherwise render it admissible."

Documentary Evidence—Common Law Rule

(A) Civil Proceedings

As in the case of oral evidence, the departure from the Common Law rule of Primary Evidence as to documentary evidence is more extensive in the case of civil proceedings. Section 8 of the UK Civil Evidence Act 1995 provides:

> **S. 8. Proof of statements contained in documents.**—(1) Where a statement contained in a document is admissible as evidence in civil proceedings, it may be proved—
>
> (a) by the production of that document, or
>
> (b) whether or not that document is still in existence, by the production of a copy of that document or of the material part of it,
>
> authenticated in such manner as the court may approve.

40 See also, Report of Court of Appeal Criminal Division, "Hearsay Evidence", December 2012, p. 15. Available at: http://www.judiciary.gov.uk/publications-and-reports/reports/crime/court-appeal-criminal-division/appeal-court-criminal-division-annualrpt-11-12 (last accessed on 28th January, 2015). Paciocco and Stuesser observe: "In considering 'reliability', a distinction is made between 'threshold' and 'ultimate' reliability. This distinction reflects the important difference between admission and reliance. Threshold reliability is for the trial judge and concerns the admissibility of the statement. The trial judge acts as a gatekeeper... Once admitted, the jury remains the ultimate *arbiter* of what to do with the evidence and deciding whether or not the statement is true. David M. Paciocco and Lee Stuesser, *The Law of Evidence*, 6th edn (Toronto, 2011), at pp. 122-23. Under the Indian Evidence Act, exceptions have been made to the hearsay rule as in the case of dying declaration but safeguards as to reliability have been built into the exceptions, and the Court will have to admit even such hearsay evidence if it satisfies the double-test of legal relevancy and reliability.
41 *Regina v. Shabir*, [2012] EWCA Crim 25 64.
42 In *Riat*, ibid., Hughes LJ said: "the critical thing is that every effort has to be made to get the witness to court". See also, *R. v. Fagan & Fergus*, [2012] EWCA Crim 2248 and *R. v. Claridge*, [2013] EWCA Crim 203.
43 *R. v. B. (K.G.)*, [1993] 1 SCR 740.
44 *R. v. Youvarajah*, 2013 SCC 41.
45 *R. v. Baldree*, 2013 SCC 35, para. 6.

(2) It is immaterial for this purpose how many removes there are between a copy and the original

It is evident from the above provision that it radically alters the Best Evidence rule as applicable to documentary evidence and gives a go-by to the Primary Evidence rule. Under Section 8:

(a) it is not mandatory that the contents of the document should be proved by primary evidence;

(b) even if the original is in existence, the document can be proved by its copy properly authenticated; and

(c) the copy need not be copied from the original and it can be a copy of the copy of the copy and so on.

Australia's Original Document rule abolished

Section 51 of the Australian Evidence Act, 2008 also has done away with the Common Law rule requiring the production of the original document. Section 51 of the Australian Evidence Act, 2008, states in its heading that "Original document rule abolished", and expressly provides:

> The principles and rules of the common law that relate to the means of proving the contents of documents are abolished.

In Hong Kong and Singapore also, where the Evidence Acts are substantially based on the Indian Evidence Act, the Courts appear to be moving towards steady erosion of the Best Evidence rule in its application to the documentary evidence. In *Tang Yiu Hong Eric v. HKSAR*,[46] the Hong Kong Court of Final Appeal observed that "[fl]ar from the best evidence rule being an established norm … the very existence of that rule is much in doubt". In *Jet Holding Ltd and others v. Cooper Cameron (Singapore) Pte Ltd and another*,[47] the Court of Appeal of Singapore has held that "whilst … a party seeking to introduce documents into evidence ought to comply with the provisions in the Evidence Act, if these documents are in fact marked and admitted into evidence without that party in fact satisfying the requirements in the Evidence Act *and* where there has been *no objection taken by the other party at that particular point in time*, then that other party *cannot* object to the admission of the said documents later."

(A) Criminal Proceedings

Section 133 of Criminal Justice Act, 2003, virtually reproduces section of Civil Evidence Act quoted above and provides:

> **S. 133. Proof of statements in documents.**—Where a statement in a document is admissible as evidence in criminal proceedings, the statement may be proved by producing either—
>
> (a) the document, or

46 *Tang Yiu Hong Eric v. HKSAR*, [2006] HKCU 92.
47 *Jet Holding Ltd and others v. Cooper Cameron (Singapore) Pte Ltd and another*, [2006] 3 SLR 769. See, Alvin Chen, "The End of the Best Evidence Rule in Singapore?" *www.lawgazette.com.sg/2007-1/feature3.htm* (last accessed on 28th January, 2015).

> (b) (whether or not the document exists) a copy of the document or of the material part of it, authenticated in whatever way the court may approve.

In *Masquerade Music Ltd & Ors v. Springsteen*,[48] Lord Parker dealing with a case of proof of documents by secondary evidence, observed:

> …there is in my judgment a parallel to be drawn between the gradual erosion and eventual abolition of the hearsay rule in civil proceedings and the decline of the best evidence rule. To my mind, the abolition of the hearsay rule in civil proceedings effected by the Civil Evidence Act 1995 is as clear a reflection as one could find of the modern tendency to admit all relevant evidence…[49]

Lord Parker's parallel between the erosion of hearsay rule under the Civil Evidence Act and of the primary evidence rule as applied to documentary evidence implied that the Parliament and the Courts in England are inclined to abandon the Best Evidence Rule in its application to criminal as well as civil proceedings, and to oral as well as documentary evidence. In *Garton v. Hunter*,[50] Lord Denning said: "That old rule has gone by the board long ago .... Nowadays we do not confine ourselves to the best evidence." In *Kajala v. Noble*,[51] Ackner L.J., observed:

> The old rule, that a party must produce the best evidence that the nature of the case will allow, and that any less good evidence is to be excluded, has gone by the board long ago. The only remaining instance of it is that, if an original document is available in one's hands, one must produce it; nowadays we do not confine ourselves to the best evidence. The goodness or badness of it goes only to weight, and not admissibility.

It can be seen from the *dicta* of Lord Parker quoted above that the English approach to relevancy is in favour of "the modern tendency to admit all relevant evidence".[52] The difference between this view and the view adopted by Sir James Stephen in the Indian Evidence Act is that the Act treats all facts as irrelevant unless they are expressly permitted.[53] In the light of the statutory changes and the Courts' pronouncements, it is clear that the Parliament and Courts in England would prefer to leave the questions of weight and credibility of mode of proof of evidence adduced by one party in an adversarial proceeding to the objections to be raised by the other party, and if the other party accepts or does not object, it can be treated as acquiescence or waiver. This approach is evident from Singapore Court's dictum quoted above. Thus, the paradigm shift occurred when, as applied to documentary evidence, the Courts shifted the conceptual emphasis of the best evidence rule from whether the secondary evidence is relevant and admissible to whether it is reliable. Again, as applied to oral evidence, the question is not any more whether hearsay is relevant but whether a particular piece of hearsay is reliable. *In other words, if evidence is reliable, it ought to be relevant.* This shift allocates to judicial discretion exercisable on a case-by-case basis of grafting exceptions to hearsay rule which are not predetermined by the legislature and which the parties would not know beforehand.

48 *Masquerade Music Ltd & Ors v. Springsteen*, [2001] EWCA Civ 513, para. 85.
49 Ibid., para. 84.
50 *Garton v. Hunter*, [1969] 1 All ER 451, [1969] 2 QB 37, p. 44.
51 *Kajala v. Noble*, (1982) 75 Cr. App. Rep. 149, p. 152.
52 Fn. 48 above.
53 See Chapter III on Relevancy.

(2) Direct and Circumstantial Evidence

Suppose, A killed B by shooting him and the prosecution witnesses who are deposi about the murder are the following:

a. C says he saw A killing B.

b. D says he did not see A killing B but he saw both of them quarrel abo money on the day before the murder and A threatened to kill B one day.

c. E says that he saw A run away from B's house with a gun in hand on the da of murder.

d. F, the doctor says that he conducted an autopsy or postmortem on A's bod and he found that B died of gunshot wounds.

e. G, the ballistics expert, says that he test-fired the gun used in the crime an the markings on the bullet were similar to the markings on the bulle recovered from A's body. Hence, the same gun was used in the murder.

f. H, the fingerprints expert says that he compared the fingerprints of A wit those recovered from the gun, and they are identical.

In the above case, C has seen the main event of A killing B and his evidence is calle direct evidence. If the court considers the witness trustworthy, the Court can straigh away arrive at the decision that A is guilty.

None of the other witnesses have seen A killing B and, hence, they are not giving direct evidence. They are all speaking about the circumstances in which B was killed. D is talking about the quarrel between A and B which proves the motive for the offence. E's evidence shows the suspicious conduct of A running away with a gun in hand. F, the doctor's evidence establishes the cause of the death and G's evidence seeks to prove that A's gun was used in the murder. H, the fingerprints expert, has established that A was the man who used the gun against B. If the Court considers these witnesses as trustworthy, the Court can draw the necessary logical inference that A was guilty. Circumstantial evidence may take the form of oral or documentary evidence (including admissible hearsay) or real or material evidence.[54] While direct evidence does not require any inference to be drawn, circumstantial evidence, on the other hand, needs interpretation and logical construction of events.

Which is Preferable?

It was mentioned above that between direct and hearsay evidence, the law prefers direct evidence as it is firsthand and intrinsically more reliable. Then, between direct and circumstantial evidence, what should be preferred? Jeremy Bentham observed: "Abstractly considered, it cannot be denied that circumstantial is inferior to direct evidence. Direct evidence requires no inference; circumstantial evidence can exist only by inferences, and there is scarcely one which is not erroneous."[55] As Phipson aptly points out, "the superiority of the former is that it contains at most one source of error, fallibility of assertion, while the latter has in addition, fallibility of

54 Adrian Keane and Paul McKeown, *The Modern Law of Evidence*, 9th edn, (Oxford, 2012), p. 12.
55 Jeremy Bentham, A Treatise on Judicial Evidence, Extracted from the Manuscripts of Jeremy Bentham, Esq. by M. Dupont (London, 1825), p.184.

inference."[56] In other words, direct evidence may be unreliable for two reasons: (a) the witness may be mistaken in his perceptions and (b) the witness may be untruthful. The circumstantial evidence suffers from not only those two deficiencies on the part of the witness but also from the additional defect of faulty inferences on the part of the Court.[57] As William Willis observed, "there is no apparent necessary connection between the facts and the inference; the facts may be true and the inference erroneous."[58]

Whatever may be the relative intrinsic merits, it is obvious that both direct and circumstantial evidence are to be looked into and there is no automatic preference for one as against the other. In the above example of A shooting and killing B, C's evidence, even if truthful, that he saw A killing B only proves the event of A shooting and killing B but not the nature of the offence. There are any number of possibilities regarding the nature of the offence depending on the actual circumstances.

- Was A an infant below the age of 7 years? (No offence—Excuse)
- Was A acting in self-defense? (No offence—justification)
- Was A insane? (No offence—excuse)
- Was A acting under grave and sudden provocation from B? (Excuse—'Diminished Responsibility' for Culpable Homicide not amounting to murder)
- Did A kill B with latter's consent? (Excuse—Culpable Homicide not amounting to murder) and so on.

So, the direct evidence of C that he saw A killing B does not lead *ipso facto* to any definite and final conclusion regarding the actual offence committed. It is the circumstantial evidence which throws light on the offence committed. Without the relevant circumstantial evidence it is often impossible to state what offence has been committed merely through direct evidence. The Supreme Court has held that circumstantial evidence, if cogent and consistent, can form the sole basis for conviction.[59]

Result Crimes and Conduct Crimes—Relevance of Circumstantial Evidence

In modern criminal law, a distinction is made between "result crimes" and "conduct crimes". A result offense is an offense of which a result is an element of the offense: throwing a stone is not an offence but hitting somebody with it is an offence. A conduct offense occurs where the conduct at issue is *per se* an offense and it's consequence is not a necessary component. Perjury is an example of conduct offence *i.e.*, lying under an oath is an offence irrespective of whether it is believed or whether it has caused any loss to another person. Australian Criminal Code, Schedule,

56 Phipson, Sydney L. Phipson, *Law of Evidence*, 10th edn, Michael V. Argyle, ed., (London, 1963), p. 5. Wills says: "Where the evidence is direct, and the testimony credible, belief is the immediate and necessary result; whereas, in cases of circumstantial evidence, process of inference and deduction are necessarily involved—frequently of a delicate and perplexing character—liable to numerous causes of fallacy." C.E. Wills, Circumstantial Evidence, 7th edn., 1937, p. 45. Salmond also is of the same opinion regarding fallibility of inference in the case of circumstantial evidence. Salmond on Jurisprudence, 12th edn, P J. Fitzerald, (London, 1966), pp.466-467.
57 See, Ernest Cockle, Leading Cases on the Law of Evidence (1907), p. 63.
58 William Wills, Essay on the Principles of Circumstantial Evidence (Philadelphia, 1857), p. 32.
59 *Mula Devi v.Uttar Pradesh*, AIR 2009 SC 655 : (2008) 14 SCC 511.

Section 4.1 states: (1) A physical element of an offence may be: (a) conduct; or (b) a result of conduct; or (c) a circumstance in which conduct, or a result of conduct, occurs. Section 4(2) of the Code defines "conduct" as meaning "an act, an omission to perform an act or a state of affairs." An example of "state of affairs" is that drinking is not an offence and driving is not an offence but drunken driving is an offence irrespective of whether injury is caused to anybody.[60] Here the offence consists not of "doing" but of "being".[61] Hence, the circumstances in which the act is committed constitute an important component of the offence.

"Witnesses may lie but circumstances do not"?

However, it is sometimes said that circumstantial evidence is preferable to direct evidence as "witnesses may lie but circumstances do not." Baron Parke observed: "Circumstantial evidence, if cogent and properly let in is of better probative value than direct evidence, for any scheming witnesses might concoct a well-knit story."[62] Salmond says: "it is usually more difficult to fabricate a convincing chain of circumstance than to utter a direct lie."[63] The argument here is that when C says in our illustration above that he saw A killing B, he might be lying. But, the circumstances of B dying of gunshot wounds, that it was A's gun that was used in killing B, that it was A who used the gun etc, cannot lie as they are all "hard" facts of bullet, gun, fingerprints etc. While it appears to be so superficially, actually the so-called hard facts also reach the Court room through witnesses like D,E,F,G and H, and if A, the direct witness can lie, so also the witnesses who are deposing as to the circumstances. As Sir James Fitzjames Stephen observed: "It may be said that in strictness all evidence is oral, as documents or other material things must be identified by oral evidence before the court can take notice of them."[64]

In *Sarbir Singh v. Punjab*,[65] the Supreme Court observed:

> It is said that men lie but circumstances do not. Under the circumstances prevailing in the society today, it is not true in many cases. Sometimes the circumstances which are sought to be proved against the accused for purpose of establishing the charge are planted by the elements hostile to the accused who find out witnesses to fill up the gaps in the chain of circumstances.

60 *Duck v. Peacock* [1949] 1 All ER 318. In this case, a man who was under the influence of drink and was at the steering stopped the car on the street when he felt dizzy and fell asleep till he was woken up by the police at midnight. Goddard CJ., held that he would not "countenance" that "a man who had too much to drink so that he was unfit to manage the car or be in charge of it could escape the penalty of disqualification merely by stopping and sleeping in the car."

61 In *R v. Larsonneur* (1933) 24 Cr App R 74, a French woman was deported against her will from Ireland to England by the Irish authorities. Upon her arrival she was immediately charged with the offence of 'being' an illegal alien. Her conviction was upheld despite the fact that she had not voluntarily come to England.

62 *Wright v. Tatham*, 112 Eng.Rep. 488 Exch.Ch.1837). In this oft-quoted case, a will was sought to be set aside on the ground of incompetency of the testator. The proponents of the will sought to adduce evidence that certain individuals wrote letters to the testator in which they expressed their belief that the testator was able to make intelligent decisions. Baron Parke rejected the evidence as implied hearsay and gave his famous telling illustration of the captain of a ship. The Baron asked: "Is it hearsay to offer proof of the seaworthiness of a vessel that its captain, after thoroughly inspecting it, embarked on an ocean voyage upon it with his family?"

63 Salmond on Jurisprudence, 12th edn, P.J. Fitzerald, (London, 1966), p.467.

64 Sir James Fitzjames Stephen, The Indian Evidence Act: With an Introduction of the Principles of Judicial Evidence (London, 1872), Macmillan Co., p. 12.

65 *Sarbir Singh v. Punjab*, 1993 Supp (3) SCC 41.

Sometimes the circumstantial evidence can lead to very misleading and disastrous conclusions. In an oft-quoted case,[66] T, a housemaid was working with a family, and on a Sunday morning the whole family except T went to the church. The butcher who was regularly supplying meat to the family sent his assistant to deliver some veal at their home. The butcher, after delivering the meat, did not go away and instead he stole a cabinet consisting of jewelry and expensive gold coins and hid himself in the garret (attic) when T was upstairs. Unawares that the butcher was present in the room, T undressed herself and said to herself looking at the mirror; "Ah, what a creature is a naked woman!" The butcher heard that comment and quietly slipped away from the house with the stolen goods. The robbery was reported to the police and T told them that nobody had entered or gone out of the house during the absence of the family at the church. As in any criminal case the key elements are motive and exclusive opportunity, the police arrested T and she was finally found guilty and served out her sentence of imprisonment. Later, when she was going through the market, the butcher tapped on her shoulder and said "Ah, what a creature is a naked woman!" T was taken aback and suddenly remembered that she made that comment to herself on the day of robbery, and then reported the matter to the police. The butcher was arrested and confessed to his guilt. Thus, the true culprit was finally found but only after the maidservant served the sentence for an offence which she never committed. Consequently, the witnesses who depose about the circumstances may be mistaken or lying, and, even if the witnesses are right and truthful, the Court that is interpreting the circumstances might draw wrong inferences from them. That was why Baron Alderson sounded a note of warning in *Reg. v. Hodge*[67] about the tricks that human mind can play in construing circumstances. He said:

> The mind was apt to take a pleasure in adapting circumstances to one another and even in straining them a little, if need be to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is waiting to take got granted, some facts consistent with its previous theories and necessarily to render them to complete.

Hence, there cannot be any *a priori* preference between direct and circumstantial evidence and as, Phipson says, "the two forms are equally admissible...both forms admit of every degree of cogency from the lowest to the highest."[68]

Two Meanings of "Direct"

The word "direct" occurs in both the classifications of (i) direct and hearsay and (ii) direct and circumstantial evidence. The word "direct" is used in the first sense in Section 60, but the term "hearsay"[69] in the first classification and the terms "direct" and "circumstantial" in the second classification do not occur anywhere in the Evidence Act. Sir James Fitzjames Stephen observes:

66 Referred to in John Davison Lawson, *Law of Presumptive Evidence*, (First published in 1899), Paperback Indian edn., (2008), p. 588.

67 *Reg. v. Hodge*, (1838) 2 Lewin 227.

68 Phipson, Sydney L. Phipson, *Law of Evidence*, 10th edn, Michael V. Argyle, ed., (London, 1963), p.5. Hence, "Both direct evidence and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other." California Jury Instructions Criminal No. 2.00, (5th ed. 1988), pp.21-22.

69 James Fitzjames Stephen said that the phrase 'hearsay evidence' "which… is used by the English writers in so vague and unsatisfactory a manner finds no place in our draft". Select Committee First Report, quoted in Chitaley and S. Appu Rao, The Indian Evidence Act, Corpus Juris of India, Vol. 1 (Nagpur, 1956), p. Unnumbered (after Contents).

> But 'circumstantial evidence' usually means a fact, from which some other fact is inferred, whereas 'direct evidence' means testimony given by a man as to what he has himself perceived by his senses. It would be correct to say that circumstantial evidence must be proved by direct evidence—a clumsy mode of expression, which is in itself a mark of confusion of thought.[70]

It is respectfully submitted that the confusion arose out of the difference between the uses of the term "direct" in the two classifications.

1. Ernest Cockle points out that "the distinction between 'direct' and 'circumstantial' refers to the facts offered in evidence; that between 'direct' and 'hearsay' refers to the mode of proving such facts."[71]
2. Phipson[72] points out that direct evidence seeks to prove the *factum probandum* or 'facts in issue' whereas the circumstantial evidence goes to prove *facta probantia* or relevant facts.[73]

James Fitzjames Stephen observes:

> If the distinction is that direct evidence establishes a fact in issue, whereas circumstantial evidence establishes a collateral fact, evidence is classified, not with reference to its essential qualities, but with reference to the use to which it is put; as if paper were to be defined, not by reference to its component elements, but as being used for writing or printing....Evidence, therefore, should be defined, not with reference to the nature of the fact which it is to prove, but with reference to its own nature.[74]

The distinction can be looked at from a different perspective as follows:.

1. In the first sense (Direct-Hearsay), the term "direct" answers the question: who saw? If the witness says "I saw", it is direct and if he says "I did not see, but X told me", it is hearsay. Here, the focus is on by what means or mode the fact in issue or relevant facts are sought to be proved.
2. In the second sense (Direct-Circumstantial), the term "direct" answers the question: what did you see? If the witness says "I saw A killing B", it is direct, and if he says "I saw the circumstances in which B died", it is circumstantial evidence. Thus, this distinction is based on what kind of facts are sought to be proved and this was what Cockle was referring to above. Thus, (a) whether it was A who killed B is the fact in issue and (b) what were the circumstances in which A killed B relates to the relevant facts. This was the aspect that Phipson also was emphasizing. Here, both (a) and (b) can be proved by direct or circumstantial evidence.
3. A witness can go to the second question only if he answers the first question by saying "I saw". If he says he did not see, then he is giving hearsay and he will not be allowed, as a rule, to proceed further. If he says "I saw", then, the next question is: what did you see? If he says "I saw A killing B", he is giving "direct" evidence in the second sense, and if he says "I saw A and B

70 Sir James Fitzjames Stephen, *An Introduction to the Indian Evidence Act: The Principles of Judicial Evidence*, Second Impression, (Calcutta, 1904), pp. 6-7.
71 Cockle, Leading Cases on the Law of Evidence (1907), p.62.
72 Phipson, , Sydney L. Phipson, Law of Evidence, 10th edn, Michael V. Argyle, ed., (London, 1963), p.5.
73 See *infra* for a discussion on facts in issue and relevant facts.
74 Hence, Stephen says that he defined the term 'evidence' in the first of these senses only i.e., direct and hearsay and not in the other sense of direct and circumstantial evidence. See, the Select Committee First Report, Select Committee First Report, quoted in Chitaley and S. Appu Rao, The Indian Evidence Act, Corpus Juris of India, Vol. 1 (Nagpur, 1956), p. Unnumbered (after Contents).

quarrel with each other on the previous day", he is giving circumstantial evidence.

4. The first classification is based on the question "who saw?" and the second classification is based on the question "what did you see?"
5. So, in the first sense, the evidence has got to be direct in every case but in the second sense, the evidence could be direct or circumstantial. In other words, only a witness who has himself seen, heard or perceived by his senses (direct evidence, in the first sense) can give direct or circumstantial evidence in the second sense. Whether it is direct or circumstantial evidence, the witness who is deposing has got to give direct evidence in the first sense i.e., he himself must have seen the main event or the circumstances surrounding it.

Proof of Corpus Delicti

The words *corpus delicti* means "body of crime" or the dead body. Sir Mathew Hale, the renowned Lord Chief Justice, stated the older rule: "I would never convict a person of murder or manslaughter unless the fact were proved to be done, or at least the body was found dead."[75] However, as pointed out in *Lakshmi and Ors. v. Uttar Pradesh*,[76] "Undoubtedly, the identification of the body, cause of death and recovery of weapon with which the injury may have been inflicted on the deceased are some of the important factors to be established by the prosecution in an ordinary given case to bring home the charge of offence under Section 302 IPC. This, however, is not an inflexible rule." In *Rama Nand & Ors. v. Himachal Pradesh*,[77] the Supreme Court observed:

> This was merely a rule of caution, and not of law. But in those times when execution was the only punishment for murder, the need for adhering to this cautionary rule was greater. Discovery of the dead-body of the victim bearing physical evidence of violence, has never been considered as the only mode of proving the *corpus delicti* in murder. Indeed, very many cases are of such a nature where the discovery of the dead-body is impossible. A blind adherence to this old "body" doctrine would open the door wide for many a heinous murderer to escape with impunity simply because they were cunning and clever enough to destroy the body of their victim.

In *Mani Kumar Thapa v. Sikkim*,[78] the Court held that "in a trial for murder, it is neither an absolute necessity nor an essential ingredient to establish *corpus delicti*." In *Prithipal Singh v. Punjab*,[79] the Apex Court said: "The *corpus delicti* in a murder case has two components - death as result, and criminal agency of another as the

75 Sir Mathew Hale, *History of the Pleas of the Crown*, 1st American edn., (Philadelphia, 1847), (England edn in 1678), vol.2, Chapter XXXIX, p. 289. One of the reasons for Sir Hale's view was that, in some of the cases that he referred to, the so-called "victims" of murder turned up after the convict has been properly hanged and in one case to claim inheritance. *Ibid.* Courts have often misread Sir Hale's statement to stand for the proposition that he was against any murder conviction "in the absence of a *corpse*". The stress in Sir Hale's axiom is on the importance of the phrase, "unless the fact were proved to be done." See for a scholarly article on *corpus delicti*, Francis Paul Greene, "I Ain't Got No Body: The Moral Uncertainty of Bodiless Murder Jurisprudence in New York after People v. Bierenbaum", Fordham Law Review, Vol. 71, Issue 6 (2003), p. 2863-2906.
76 *Lakshmi and Ors. v. Uttar Pradesh*, (2002) 7 SCC 198 : AIR 2002 SC 3119.
77 *Rama Nand & Ors. v. Himachal Pradesh*, AIR 1981 SC 738.
78 *Mani Kumar Thapa v. Sikkim*, AIR 2002 SC 2920 : (2002) 7 SCC 157.
79 *Prithipal Singh v. Punjab*, (2012) 1 SCC 10 : (2011) 12 SCALE 411(2).

means. Where there is a direct proof of one, the other may be established by circumstantial evidence."[80] In *Ramjee Rai & Ors. v. Bihar*[81] the Court observed: "It is now a trite law that *corpus delicti* need not be proved. Discovery of the dead body is a rule of caution and not of law. In the event there exists strong circumstantial evidence, a judgment of conviction can be recorded even in absence of the dead body." It was held that in the event of murder of an abducted person, it would not be necessary to prove the *corpus delicti*, and an inference of murder can safely be drawn by direct or presumptive evidence.[82]

Circumstantial Evidence—Tests for Reliability

As mentioned above, circumstantial evidence is as important as the direct evidence and there is no preference *inter se*, but, unlike direct evidence, circumstantial evidence requires logical, cogent and sequential arrangement of facts and their proper interpretation. In most cases, either the direct evidence is not available at all or is insufficient to found a conviction on. The circumstantial evidence sometimes plays a secondary and auxiliary role of proper corroboration of direct evidence as in the case of forensic evidence substantiating the ocular evidence. But, often, circumstantial evidence plays the primary role where the direct evidence is absent or too meager. The Courts have repeatedly held that circumstantial evidence can be the sole basis for a verdict if the evidence is reliable. Then, what are the tests that the courts have laid down to determine the reliability of such evidence?

In *Hanumant Govind Nargundkar v. Madhya Pradesh,*[83] Mahajan, J. speaking for the Court observed:

> It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

Lord Simon said in *DPP v. Kilbourne*[84] that circumstantial evidence "works by cumulatively, in geometrical progression, eliminating other possibilities".In the recent case of *Palanisamy v. Tamil Nadu,*[85] the Supreme Court, relying on a catena of its own earlier decisions, held that a conviction can safely be based on circumstantial evidence provided it satisfies the following tests:

80 In *Jackson v. State*, 29 Tex. App. 458, 16 S.W. 247, the Texas Court of Appeals stated that "In murder the *corpus delicti* has two components: death as the result, and the criminal agency and identity of another as the means." In *Frazier v. United States*, 1909 OK CR 101, Oklahoma Court of Criminal Appeals held: "It was the duty of the trial court to give a proper instruction [to the jury] on the *corpus delicti*, and also to give a proper instruction on the burden of proof" that it was for the prosecution to prove it beyond reasonable doubt.

81 *Ramjee Rai & Ors. v. State of Bihar*, 2006 (8) SCALE 440 : (2006) 13 SCC 229.

82 *Badshah & Ors. v. Uttar Pradesh*, para. 19, http://indiankanoon.org/doc/1895627/

83 *Hanumant Govind Nargundkar v. Madhya Pradesh*, 1952 SCR 1091. Also, *Govinda Reddy and anothers v. Mysore*, AIR 1960 SC 29.

84 *DPP v. Kilbourne*, (1973) AC 729, at p. 758 (HL).

85 *Palanisamy v. Tamil Nadu*, (2008) 3 SCC 100

(1) All the circumstances forming a chain of events must be fully established and no link in the chain should be found missing. It should be like a jigsaw puzzle whose pieces are correctly put in place..
(2) The circumstantial evidence must be consistent with the hypothesis of the guilt only of the accused and of none others.
(3) It must be of conclusive nature.
(4) It should be inconsistent with the innocence of the accused.
(5) It should exclude every other hypothesis except the guilt of the accused.
(6) The *corpus delicti* (dead body of the victim) need not be proved but the fact of death must be proved in a murder case.[86]

The Supreme Court observed: "The Courts have to be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes, unconsciously it may happen to be a short step between moral certainty and legal proof....there is a long mental distance between 'may be true' and 'must be true' and the same divides conjectures from sure conclusions."[87]

Documentary Evidence

As seen above, Section 3 defines documentary evidence as "All documents including electronic records produced for the inspection of the Court; such documents are called documentary evidence."

"Document"

Section 3 defines document as:

> Document means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.[88]

86 Also, *Hukam Singh v. Rjasthan*, AIR 1977 SC 1063; *Eradu v. Hyderabad*, AIR 1956 SC 316; *Earabhadrappa v. Karnataka*, AIR 1983 SC 446; *Uttar Pradesh v. Sukhabasi*, AIR 1985 SC 1224; *Balwinder Singh v. Punjab*, AIR 1987 SC 350; *Ashok Kumar Chatterji v. Madhya Pradesh*, AIR 1989 SC 1890; *Manjunath v. Karnataka*, AIR 2007 SC 2080; *Liyakat v. Uttaranchal*, AIR 2008 SC 1537; *Goa v. Pandurang Mohite*, AIR 2009 SC 1066; *Samadhan Dhudaka Koli v.Maharashtra*, AIR 2009 SC 1059; *Bhagat Ram v. Punjab*, AIR 1954 SC 621; *Chenga Reddy and Ors. v. Andhra Pradesh* (1996) 10 SCC 193; *Padala Veera Reddy v. Andhra Pradesh and Ors.*,AIR 1990 SC 79; *Uttar Pradesh v. Ashok Kumar Srivastava*, 1992 Cri LJ 1104; *Rajasthan v. Rajaram*, 2003 (8) SCC 180, *Haryana v. Jagbir Singh and Anr.* 2003 (11) SCC 261; *Rama Nand v. Himachal Pradesh*, (1981) 1 SCC 511; *Gambir v. Maharashtra*, (1982) 2 SCC 351; *Earabhadrappa v. Karnataka*, (1983) 2 SCC 330; *Uttar Pradesh v. Dr. Ravindra Prakash Mittal*, AIR 1992 SC 2045: 1992 SCR(2) 815 :1992 (3) SCC 300. JT 1992 (3) 114: 1992 (1) SCALE 937; *Ram Avtar v. Delhi Administration*, [1985] (Supp.) SCC; *Vadlakonda Lenin v. Andhra Pradesh* , 2012 (11) SCALE 237 : (2012) 12 SCC 260.

87 *Wakkar & Anr. v. Uttar Pradesh*, 2011 (2) SCALE 198 : (2011) 3 SCC 306 .

88 Similar definitions are contained in Section 29 of IPC and Section 3(18) of the General Clauses Act, 1897. Sir Stephen has stated that the definition was taken from the definition of the term in IPC. See, Sir James Fitzjames Stephen, A Digest of Law of Evidence (1876, London), Note I, p. 131. While Section 29 of IPC states that the recording is to be done "as evidence of that matter", Explanation 1 says that "it is immaterial...whether the evidence is intended for, or may be used in, a Court of Justice, or not." Section 3 of Evidence Act merely says that it is "intended to be used, or which may be used, for the purpose of recording that matter." The definition in the General Clauses Act is substantially similar to that in Indian Evidence Act.

Illustrations

A writing[89] is a document;

Words printed, lithographed or photographed are documents;

A map or plan is a document;

An inscription on a metal plate or stone is a document;

A caricature is a document.

Thus, the definition includes recording of "any matter" upon "any substance" and, thus, covers not only the paper-based documents but also lithographs, stone inscriptions and photographs as stated in the illustrations to the section. Currency notes[90] and even tattooed skin has been held to fall within the definition of document.

Definition of 'evidence' in Section 3, referred to above, states that documentary evidence includes "electronic records"[91] and this was added to the Evidence Act by way of amendment by the Information Technology Act (IT Act) of 2000.[92] Hence, floppies, CDs, DVDs, hard-discs and satellite images can be treated as documents.[93]

Primary and Secondary Evidence

Documentary Evidence is classified into primary and secondary evidence. Section 62 of the Evidence Act says that primary evidence means the "document itself" or what is called the "original" document. Section 63 defines "Secondary Evidence" and includes in its scope, *inter alia*, typed copies, Xerox copies etc of the original document. Though Section 61 says that "the contents of documents may be proved either by primary or secondary evidence", Section 64 lays down the mandatory rule that "documents must be proved by primary evidence except in the cases hereinafter mentioned."[94] Thus, between primary and secondary evidence, the Evidence Act prefers the original document, as any subsequent duplication of the original through human intervention is liable to errors or tampering.

Material Evidence

After Oral and Documentary evidence, the third classification is that of material evidence. Material evidence is also sometime referred to as Objects or Real Evidence and means material objects like knives, guns, bullets etc adduced as evidence.

89 Section 3(65) of the General Clauses Act, 1897 defines the word "Writing" as: "expressions referring to 'writing' shall be construed as including references to printing, lithography, photography and other modes of representing or reproducing words in a visible form".

90 *Charan Saha v. D.M. of Belonia*, AIR 1962 Tripura 50.

91 The term 'electronic record' is defined by the IT Act of 2000 as meaning "data, record or data generated, image or sound stored, received or sent in any electronic form or micro film or computer generated micro fische." The expressions used in the Evidence Act after the 2000 amendment like 'Certifying Authority', 'Digital Signature', 'Digital Signature', 'Electronic Form', 'Electronic Records, 'Information', 'Secure Electronic Record', 'Secure Digital Signature' and 'Subscriber' shall have the meanings assigned to them by the Act of 2000.

92 Even earlier to the IT Act, in *R.M Malkani v. Maharastra*, AIR 1973 SC 157, the Apex Court made it clear that electronically recorded conversation like tape-record is admissible in evidence. Also, *K.K.Velusamy v. Palaanisamy*, [2011] 4 SCR 31.

93 See for a detailed discussion on 'Electronic Records as Evidence' under S. 65B *infra*.

94 The exceptions are mentioned in S. 65 and a detailed discussion of these provisions will be found *infra* under those sections.

Section 60 of the Evidence Act states: "Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection." When the material objects (M.O.) are produced in the Court, they are marked as M.O. 1, M.O. 2 and so on.[95]

95 Rule 58 of Andhra Pradesh Criminal Rules of Practice and Circular Orders, 1990, provides:
Rule 58. Marking of exhibits.—(1) Exhibits admitted in evidence shall be marked as follows:—
(i) if filed by the prosecution with the capital letter 'P' followed by a numeral, P1, P2,P3 and the like;
(ii) if filed by defence with the capital letter 'D' followed by a numeral, D1, D2, D3 and the like;
(iii) in case of Court exhibits with the capital letter 'D' followed by a numeral C1, C2, C3 and the like;
(2) All the exhibits filed by the several accused shall be marked consecutively.
All material objects shall be marked in Arabic numbers in continuous series as M.O. 1, M.O.2 and M.O.3 and the like, whether exhibited by the prosecution or the defence or the Court.

Chapter II

Presumptions

Section 4

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DEFINITION

The judges and authors have defined "presumption" in various ways but there does not seem to be an acceptable definition that would cover different situations. Often, presumption is defined as an inference drawn by the Court, on the basis of reasoning, from one fact or set of facts as to the truth or falsehood of another fact.

- Sir James Fitzjames Stephen: "A rule of law that courts and judges shall draw a particular inference from a particular fact, or from particular evidence unless and until the truth of such inference is disproved."[1]
- Abbot C.J.: "A presumption of any fact is, properly an infering of that fact from other facts that are known; it is an act of reasoning..."[2]
- Best: "An inference, affirmative or disaffirmative, of some fact drawn by a judicial tribunal, by a process of probable reasoning, from some matter of fact..."[3]
- Sarkar: "Shortly speaking, a presumption is an inference of fact drawn from other known or proved facts."[4] Thus, if a man is found in possession of goods soon after the theft, he may be presumed to be the thief.[5]

The definition of presumption by Stephen as involving an "inference" is criticized by Ernest Cockle on the ground that "presumptions need not necessarily relate to

1 Sir James Stephen, *Digest of Law of Evidence* (London, 1876), Macmillan and Co., Part 1, p. 4. Ernest Cockle says that "this use of the term is undoubtedly the most proper." *Leading Cases on the Law of Evidence*, (1903), p.14.
2 *R. v. Burdett*, (1820) 106 ER 873.
3 Best, *Law of Evidence*, 12th edn. (London, 1922), p. 313.
4 *Sarkar's Law of Evidence*, 14th edn., M.C. Sarkar et al., eds. Vol.1 (New Delhi, 1993), p. 66.
5 See, for instance, Section 114, ill. (a) of Evidence Act.

inferential facts but may (as most of them actually do) relate to direct or primary facts. For example, the presumption of innocence relates to a primary fact but the presumption of continuance of life involves an inferential fact."[6] But, as Ryan[7] points out, Stephen did not include all kinds of presumptions under the Evidence Act and he thought that some of the presumptions belong more to the substantive criminal law than the law of evidence. In fact Sir Stephen thought that the presumption of innocence "principally belongs to criminal law....though it has a bearing on proof of ordinary facts"[8] and that "the only presumptions which, in my opinion, ought to find a place in the Law of Evidence, are those which relate to facts merely as facts, and apart from the particular rights they constitute."[9] For instance, presumption of innocence is totally unrelated to facts and is entirely based on the public policy that confers a right on the accused to be presumed to be innocent until his guilt is proved beyond all reasonable doubt. As Ruma Pal J., of the Supreme Court observed: "Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter, all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt."[10] Hence, for Sir Stephen, presumption of innocence ought to be part of substantive criminal law and not of law of evidence.

Sir Stephen himself stated:

> All notice of certain general legal principles which are, sometimes called presumptions but which in reality belong rather to the substantive law than to the law of evidence, was designedly omitted, not because the truth of those principles was denied, but because it was not considered that the Evidence Act was the proper place for them. The most important of these is the presumption, as it is sometimes called, that everyone knows the law. The principle is far more correctly stated in the maxim, that ignorance of the law does not excuse a breach of it, which is one of the fundamental principles of criminal law.[11]

6 Ernest Cockle, fn 1 above, p.14.
7 J.V. Ryan, *The Law of Criminal Evidence in British India and Its Application*, (Calcutta, 1912), p. 197.
8 Sir James Stephen, *Digest of Law of Evidence* (London, 1876), Macmillan and Co., p. 188, Note XXXVI, Article 94. Cockle appears to agree with this proposition. See the text below corresponding to fn 21.
9 Sir James Fitzjames Stephen, *A Digest of Law of Evidence*, (1876, London), Introduction, p. xiii.
10 *Hiten P. Dalai v. Bratindranath Banerjee*, AIR 2001 SC 3897.
11 Sir James Fitzjames Stephen, *The Indian Evidence Act: With an Introduction of the Principles of Judicial Evidence (London, 1872)*, Macmillan Co., p. 133. As stated by Sir Stephen, the legal position is: there is no presumption that everyone knows the law but ignorance of law is no excuse for committing breach of law. In *Motilal Padampat Mills Ltd v. Uttar Pradesh*, (1979) 118 ITR 326(SC), the Supreme Court observed: "It is often said that everyone is presumed to know the law, but that is not a correct statement: there is no such maxim known to the law." In an oft-quoted statement Scrutton L.J., said: "it is impossible to know all the statutory law and not very possible to know all the common law." See T.E. Scrutton, *"The Work of the Commercial Courts"*, (1921 (I) Cambridge Law Journal 6, at p.19. Abbott, C.J., observed in *Montriou v. Jafferys*, (1825) 2 Car & P 113 at p. 116: "God forbid that it should be imagined that an attorney or counsel or even a Judge is bound to know all the law". Maula J., pointed out in *Martindale v. Falkner*, (1846) 2 CB 706: "There is no presumption in this country that every person knows the law: it would be contrary to common sense and reason if it were so..." Lord Atkin observed in *Evans v. Bartlam*, (1937) AC 473 (HL): "The fact is that there is no and never has been a presumption that everyone knows the law. There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application". It appears that the Courts in England, U.S.A. and India have been circumspect in applying even the rule that 'ignorance of law is no excuse' as rigorously to tax statutes as they

[Footnote 11 Contd.]

Thus, the presumption of innocence of the accused (rebuttable),[12] that ignorance of law is no excuse (irrebuttable)[13] and that a child below the age of seven years is incapable of committing a crime (irrebuttable)[14] do not find a place in the Evidence Act.

CLASSIFICATION OF PRESUMPTIONS

Presumptions are classified into:

1. (a) Presumptions of Fact; and (b) Presumptions of Law

A *presumption of fact* is a presumption that is drawn by a Court "which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case." (Section 114 of Evidence Act). Section 114 gives an illustrative list of nine presumptions which are called "maxims" by the section itself. The best example of this kind of presumption is illustration (a) to Section 114 which says: "The Court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession." This presumption is based upon commonsense and the section permits the man against whom the presumption is drawn "to account for his possession." If he gives a satisfactory explanation regarding how he got the possession of the stolen goods, he is said to have rebutted or disproved it. However, presumption can be based on facts already proven and a presumption cannot be based on another presumption.[15]

Presumptions of law[16] have been defined as "arbitrary inferences which the Law directs the Court to draw from particular facts without regard to the logical inclination of the mind as influenced by the facts."[17] Under Section 82 of IPC, the law directs the Court to presume that "nothing is an offence which is done by a child below the age of seven years." Here, it is irrelevant whether in fact the child is mentally mature enough to understand the nature of its act and its consequences; the Court must follow the law's direction irrespective of the Court's own assessment of the child's maturity.

[Footnote 11 Contd.]

> would apply to criminal statutes. In *Commissioner of Income-tax v. P.S.S. Investments P. Ltd.*, [1977] 107 ITR 0001, the Court held: "The intelligence of even those with legal background gets staggered in this continuous process of carving exceptions to exceptions. It seems more like a conundrum, baffling the mind and requiring special acumen to unravel its mystique. One can only wonder as to how the ordinary tax-payers, most of whom are laymen, can keep abreast of such laws. Yet the maxim is that everyone is presumed to know the law." See also, *Spread v. Morgan*, 11 HL 588, at p.602; and *United States v. Murdock*, 290 U.S 389 (1933).

12 This presumption which is a fundamental principle of criminal jurisprudence does not find a place in IPC or CrPC or in any other Indian enactments.
13 *Ignorantia juris non excusat or Ignorantia legis neminem excusat* (Latin for "ignorance of the law does not excuse" or "ignorance of the law excuses no one"). This is implied in Section 76 of IPC.
14 See Section 82 of IPC.
15 *Suresh Budharmal Kalani v. Maharshtra*, 1998 Cri LJ 4592 (SC) : AIR 1998 SC 3258 : (1998) 7 SCC 337; *Dueful Laboratory v. Rajasthan*, 1998 Cri LJ 4534 (Raj).
16 W.M. Best, *A Treatise on Presumptions of Law and Fact: With the Theory and Rules of Presumptive Or Circumstantial Proof in Criminal Cases*, (London, 1844).
17 J.V. Ryan, *The Law of Criminal Evidence in British India and Its Application*, (Calcutta, 1912), p.197.

Distinction

Phipson distinguishes between the two presumptions as follows:

(i) "presumptions of law derive their force from law; while presumptions of fact derive their force from logic";

(ii) a presumption of law applies to a class, the conditions of which are fixed and uniform; a presumption of fact applies individual cases, the conditions of which are inconstant and fluctuating"; and

(iii) in England where the jury system prevails, "presumptions of law are drawn by the court…and presumptions of fact are drawn by the jury".[18]

To the above distinctions made by Phipson, one more may be added *i.e.*, a presumption of fact is discretionary in the sense that the Court is given the option either to draw or not to draw the presumption depending on the circumstances, whereas presumptions of law are mandatory and the Court has no option but to draw the presumption as directed by law.

2. (a) Rebuttable (*Presumptiones Juris*) and Irrebuttable Presumptions (*Presumptiones juris et de Juri*)

A presumption is rebuttable if the law permits the party against whom the presumption is drawn to disprove it; and it is irrebuttable if the law does not permit the party to disprove it.[19] All presumptions of fact are rebuttable whereas presumptions of law are rebuttable in some cases and irrebuttable in other cases. As mentioned above, under Section 114, illustration (b), if a person is found in possession of stolen goods soon after the theft, the Court may draw the presumption that he is the thief (presumption of fact) but it must permit the person to explain how he got into possession of the goods and that he is not a thief. Under Section 82 of IPC the presumption regarding innocence of a child below the age of 7 years is a presumption of law and irrebuttable and, hence, the prosecution will not be allowed to prove that the child must be held guilty because it is mature enough to know what it is doing. However, under Section 83 of IPC, nothing is an offence if it is done by a child above 7 years and below 12 years of age if it has not attained sufficient maturity of understanding. This is a presumption of law and, hence mandatory, but the prosecution can rebut the presumption by showing that the child has sufficient maturity.

Sir James Stephen observed:

> I use the word 'presumption' in the sense of presumption of law capable of being rebutted. A presumption of fact is simply an argument. A conclusive presumption I describe as conclusive proof.[20]

18 Sydney L. Phipson, *Law of Evidence*, 10th edn., Michael V. Argyle,,edn. (London, 1963), p. 2016.

19 William Best says: "…they are inferences which the law makes so peremptorily, that it will not allow them to be overturned by any contrary proof, however strong." The example he gives is the presumption that an infant below 7 years of age is incapable of committing a crime. W.M. Best, *A Treatise on Presumptions of Law and Fact: With the Theory and Rules of Presumptive Or Circumstantial Proof in Criminal Cases*, (London, 1844), p. 20.

20 James Fitzjames Stephen, *A Digest of Law of Evidence*, (1876, London), Note I, Article 1, p. 131. Sir Stephen further stated that the presumptions of fact are "bare presumptions of fact, —which are nothing but arguments to which the Court attaches whatever value it pleases." Sir James Fitzjames Stephen, *The Indian Evidence Act: With an Introduction of the Principles of Judicial Evidence* (London, 1872), *Macmillan Co.*, p. 132.

Section 82 of CrPC deals with "Proclamation of person absconding" and states in Clause (3) that a statement in writing by the Court that the proclamation has been published shall be "conclusive evidence" that the requirements of that Section have been complied with. In the light of the above quoted observation of Sir Stephen, if certain evidence is deemed to be "conclusive" it would be better to call it as conclusive "proof" than conclusive "evidence".

Ernest Cockle says that presumptions of fact (May Presume) and conclusive presumptions "may, with advantage be disregarded" and "a practical lawyer, when he speaks of presumption, always means a rebuttable presumption." He further points out:

> the presumptions of fact are nothing but the conclusions which the court draws from any individual combination of facts in evidence before it…and they may be considered as outside the law of evidence altogether. Conclusive presumptions of law may be, with advantage, considered as mere rules of substantive law, and not presumptions at all. For instance, it is said to be a conclusive presumption that a child under seven cannot commit a crime. Is it not more proper to put it, as a rule of substantive law, that a person of such age is incapable of crime?[21]

As Wigmore observed:

> …conclusive presumptions or irrebuttable presumptions are usually fictions, to disguise a rule of substantive law[22] and when they are not fictions they are usually repudiated in modern courts.[23]

An example of a rule of substantive law "disguised" as a presumption is Section 113 of the Evidence Act, 1950 of Malaysia which provides: "Presumption that boy under thirteen cannot commit rape--113. It shall be an irrebuttable presumption of law that a boy under the age of thirteen years is incapable of committing rape."[24] Till it was abolished by the Sexual Offences Act of 1993,[25] there was the common law presumption in England that a boy below the age of 14 was incapable of committing sexual intercourse.[26] In fact there have been cases where juveniles of 13 years of age

21 Ernest Cockle, *Leading Cases on the Law of Evidence*, (1903), p. 14.

22 Other authors also share the opinion that a conclusive presumption is not a presumption at all, but a rule of substantive law. C. McCormick, *Evidence*, 2nd edn., (1972), p. 804; Brosman, "*The Statutory Presumptions*", 5 Tul. L.Rev. (1930), p. 24; Luther Hugh Soules, "*Presumptions in Criminal Cases*", 20 Baylor L. Rev. (1968), pp. 278-79; Edmund M. Morgan, "*How to Approach Burden of Proof and Presumptions*", 25 Rocky Mt. L. Rev. (1952), p. 34.

23 John H Wigmore, *A Students Textbook of the law of Evidence*, (*Brooklyn, The Foundation Press,1935*), p. 454. Salmond also says that conclusive presumptions "are in deed, almost necessarily more or less false, for it is seldom possible in the subject matter of judicial procedure to lay down with truth a general principle that any one thing is conclusive proof of the existence of any other." *Salmond on Jurisprudence*, 12th edn, P.J. Fitzerald, (London, 1966), p. 469.

24 Though the 1950 Malaysian Evidence Act is substantially based on the Indian Evidence Act, Section 113 of the 1950 Act is an innovation.

25 The 1993 Act was passed exclusively for the abolition of the common law rule and provided in Section 1: "The presumption of criminal law that a boy under the age of fourteen is incapable of sexual intercourse (whether natural or unnatural) is hereby abolished."

26 The presumption was applied in many cases, for instance: *R v. Brimilow*, (1840) 9 C & P 366; *R v. Waite*, (1892) 2 QB 600; *R v. Fethney*, [2010] EWCA Crim. 3096 and *R v. Bevan*, [2011] EWCA Crim. 654. In *R v. Waite*, (1892) 2 QB 600, Lord Coleridge observed: "This is a *presumptio juris et de jure*, and judges have time after time refused to receive evidence to show that a particular prisoner was in fact capable of committing the offence." See a case of *Regina v. JOC*, [2012] All ER (D) 39: [2012] EWCA Crim 2458, where the trial Court mistakenly failed to apply the presumption and the mistake was detected by chance and corrected during appeal.

are charged and convicted of sexual offences in other jurisdictions.[27] Hence, it is even said that "'conclusive presumption' is a contradiction in terms" or an oxymoron, in the sense that if it is a presumption it cannot be conclusive.[28] In effect, as Sir John Salmond says, "by a conclusive presumption is meant the acceptance or recognition of a fact by the law as conclusive proof."[29]

PRESUMPTIONS UNDER THE INDIAN EVIDENCE ACT

Section 4 of the Evidence Act defines three kinds of presumptions and provides:

> **"May presume".**—Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it:
>
> **"Shall presume".**—Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved:
>
> **"Conclusive proof".**—When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

In the case of "May Presume", the Court has two options:

1. The Court may regard the fact as proved and, in case it does, the Court shall permit the other party to disprove or rebut it; or
2. The Court may not presume the fact and ask the party to prove it.

Distinction between Presumptions

In the light of the foregoing discussion on presumptions, the distinction between the three presumptions under Section 4 can be shown as follows:

May Presume	Shall Presume	Conclusive Proof
1. Presumption of fact	Presumption of law	Presumption of law
2. Discretionary	Mandatory	Mandatory
3. Rebuttable	Rebuttable	Irrebuttable

- What is in common between "Shall Presume" and "Conclusive Proof" is that both are presumptions of law and, hence, are mandatory and both the definitions say that the Court "shall" draw the presumption as directed by law.
- What distinguishes the two is that the former is rebuttable because "Shall Presume" states that the presumption stays "unless and until it is disproved", but "Conclusive Proof" is irrebuttable as the provision says that the Court "shall not allow evidence to be given for the purpose of disproving it".
- In the case of "May Presume" and "Shall Presume", the Court shall permit disproof of the presumed fact and in the case of "Conclusive proof", the Court shall not permit disproof of the presumed fact.
- What is in common between "May Presume" and "Shall Presume" is that both are rebuttable and what distinguishes the two is that the former is discretionary and the latter mandatory.

27 The latest being that of *United States v. Juvenile Male*, 131 S. Ct. 2860 (2011), where a 13- year old boy was convicted of sexually abusing a 10-year-old boy for two years.

28 Nischolas Rescher, "Presumption and the Practices of Tentative Cognition", (June 2006) Cambridge University Press, available at http://www.cambridge.org/us/catalogue/catalogue.asp?isbn=97805 21864749. (last accessed on 28th January, 2015)

29 *Salmond on Jurisprudence*, 12th edn., P.J. Fitzerald, (London, 1966), p. 468.

As stated above, Section 114 is an example of presumption of fact or "May Presume". Section 79 which provides that the certified copies given by Central or State Government officers "Shall" be presumed to be genuine is an example of "Shall Presume". The standard example of "Conclusive Proof" is the presumption of legitimacy under Section 112 by which a child born during the subsistence of a valid marriage between its mother and a man shall be conclusively presumed to be legitimate. In the case of Section 112, it is possible for the Court to draw all the three kinds of presumptions in a given case:

1. The court "may presume" on the basis of long cohabitation between a man and a woman that they are married;[30]
2. The Court "shall presume" access or opportunity to have sexual intercourse between them; and if this presumption is not rebutted by the other party
3. The Court shall treat as "conclusive proof" that the child born to them is a legitimate child.

"SHALL PRESUME, UNLESS THE CONTRARY IS PROVED"—PRESUMPTIONS UNDER OTHER ENACTMENTS

Presumptions are provided for not only in the Evidence Act but also in other enactments like the Negotiable Instruments Act of 1881 which by Section 118 provides, *inter alia*, that: "Until the contrary is proved, the following presumptions shall be made: (a) of consideration; that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration." Thus, for example, if a promissory note is signed by a person, the "shall" presumption is that he has received the money as consideration under the note.

Section 4, Prevention of Corruption Act 1947 and Section 139, Customs Act 1962 are some of the other provisions where a similar formulation of "shall presume, unless the contrary is proved" is employed. This formulation is also found in some foreign enactments.[31]

The formulation of "shall presume, unless the contrary is proved" was no where used by Sir James Fitzjames Stephen in the original Evidence Act for the simple reason that the rebuttability of "Shall Presume" has been built into the very definition of the term in Section 4 of the Act. Recently, some new provisions have been added

30 *Ajarma Bibi v. Khurshid Begum*, AIR 1998 SC 1663 : (1996) 8 SCC 81; *SPS Balasubramanyam v. Suruttayan*, AIR 1992 SC 756 : 1992 Supp(2) SCC 304.

31 See, for instance, Section 10 of Law of Marriage Act 1971 of Tanzania and Sections 19, 20 and 21, Misuse of Drugs Act 1971 of Singapore.

to the Evidence Act by way of amendment by the Information Technology Act of 2000 and other Amendment Acts but the Parliament has not been consistent in the use of terminology. While Section 85A employs "shall presume" simpliciter, Sections 85B and 85C employ "shall presume, unless the contrary is proved" for no apparent reason, though all the three sections have been added by the same IT Act. Similarly, while Section 113B (Dowry Death) added by the 1986 Amendment Act uses "shall presume", Section 111A (certain special offences) added by the Amendment Act of 1984 employs "shall be presumed, unless the contrary is shown". It is submitted that while the formulation of "shall presume, unless the contrary is proved (or "shown")" is necessary in other enactments, such a formulation is redundant in the Evidence Act because of the very definition of "Shall Presume" in Section 4 as a rebuttable presumption.[32]

"Shall Presume" and "May Presume"—Quantum of Proof in Rebuttal

As seen above, "May Presume" is a discretionary presumption and "Shall Presume" is a mandatory presumption but once the presumption is drawn in the case of "May Presume" the basic distinction between the two presumptions disappears and both become rebuttable presumptions. Thus, in *Kumar Exports v. Sharma Carpets,*[33] the Supreme Court observed:

> If in a case the Court has an option to raise the presumption and raises the presumption, the distinction between the two categories of presumptions ceases and the fact is presumed, unless and until it is disproved.

It must, however, be stated that presumptions of any kind, of law or of facts, must themselves be based on facts which are already proved. As pointed out by the Supreme Court in *Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik & Anr* (2014),[34] "we must understand the distinction between a legal fiction and the presumption of a fact. Legal fiction assumes existence of a fact which may not really exist. However presumption of a fact depends on satisfaction of certain circumstances. Those circumstances logically would lead to the fact sought to be presumed. Section 112 of the Evidence Act does not create a legal fiction but provides for presumption." In *Suresh Budharmal Kalani v. Maharashtra,*[35] it was held that "a presumption can be drawn only from facts and not from other presumptions by a process of probable and logical reasoning". In an American case *Fort Worth Belt Ry. v. Jones,*[36] the Supreme Court of Texas observed: "A presumption of fact cannot rest upon a fact presumed. The fact relied upon to support the presumption must be proved....One presumption cannot be based upon another

32 Apart from the instances pointed out above within the Evidence Act, Section 118 of NI Act uses "until" the contrary is proved and the very next Section 119 employs "unless and until" the contrary is proved. Again, while Section 118 of NI Act uses "*until* the contrary is proved", some of the recently added sections of Evidence Act use "*unless* the contrary is proved". These two formulations may not have the same meaning. Section 4 of the Evidence Act which defines presumptions employs "*unless and until* the contrary is proved". Section 111A of Evidence Act uses "shown" in the place of "proved".

33 *Kumar Exports v. Sharma Carpets*. (2009) 2 SCC 513.

34 *Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik & Anr.* (2014), (2014) 2 SCC 576 : AIR 2014 SC 932.

35 *Suresh Budharmal Kalani v. Maharashtra*, 1998 (7) SCC 337; also *Satvir Singh v. Delhi Through CBI*, 2014 STPL(Web) 549 SC 1.

36 *Fort Worth Belt Ry. v. Jones*, 106 Tex. 345, 166 S.W. 1130 (1914).

presumption."[37] Thus, for instance, the presumption that a child below the age of 7 years is *doli incapax* or incapable of committing a crime cannot be based on another presumption that the child is below the age of 7 years. That the child is below the age of 7 years must be proved by independent evidence.

But, then, the question is: Even if a presumption cannot be based on another presumption, can a presumption be *rebutted* by another presumption? There seems to have been a difference of judicial opinion on this issue.[38]

In *Kundan Lal Rallaram v. Custodian, Evacuee Property, Bombay,*[39] the Supreme Court held that "presumptions of law or presumptions of fact may be rebutted not only by direct or circumstantial evidence but also by presumptions of law or fact"[40] and the presumption of fact under Section 114 "if raised by a court, can under certain circumstances rebut the presumption of law raised under Section 118 of the Negotiable Instruments Act".[41] In effect, it would mean that the mandatory presumption under Section 118 of the NI Act could be rebutted by another discretionary presumption drawn under Section114 of the Evidence Act.[42]

However, the "more authoritative view"[43] has been laid down in the subsequent decision of a larger Bench of the Supreme Court in *Dhanvantrai Balwantrai Desai v. Maharashtra,*[44] where the Court reiterated the principles enunciated in *Madras v. Vaidyanatha Iyer,*[45] and clarified that the distinction between the two kinds of presumption lay not only in the kind of the mandate to the Court, but also in the nature of evidence required to rebut the two. In the case of "May Presume", if the presumption is drawn, it may be rebutted by an explanation which "might reasonably be true and which is consistent with the innocence" of the accused. On the other hand in the case of a mandatory presumption under the now repealed Sections 161 or 165 of IPC[46] under which it shall be presumed that a public servant accepted any

37 See also *East Tex. Theatres, Inc. v. Rutledge*, 453 S.W. 2d 466, 469 (TeL 1970).

38 *K.R. Subramanian v. Arumuganathan*, (2003), Criminal Appeal Nos. 906 to 908 of 1996, Madras High Court, *(decided on:* 17.07.2003).

39 *Kundan Lal Rallaram v. Custodian, Evacuee Property, Bombay*, AIR 1961 SC 1316.

40 *Ibid.* p. 1319 para 5. William Best also said: "rebuttable presumptions of any kind may be encountered by presumptive as well as by direct evidence." W.M. Best, *A Treatise on Presumptions of Law and Fact: With the Theory and Rules of Presumptive Or Circumstantial Proof in Criminal Cases*, (London, 1844), Ch. IV: Of Conflicting Presumptions, p. 52, para.43.

41 *Kundan Lal Rallaram v. Custodian, Evacuee Property, Bombay, Ibid.* (*per* K. Subba Rao J.); Also, *Kumar Exports v. Sharma Carpets*, AIR 2009 SC 1518, para. 11 (per J.M. Panchal J.): "The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Sections 118 and 139 of the Act."

42 The Court (*per* Justice K. Subba Rao) said that if a party claims to possess documentary proof of a promissory note transaction and "if such a relevant evidence is withheld by the plaintiff, Section.114, [Ill.g] Evidence Act enables the Court to draw a presumption to the effect that, if produced, the said accounts would be unfavourable to the plaintiff" and treat the presumption under Section 118 of NI Act as rebutted. *Ibid.*

43 *Hiten P. Dalai v. Bratindranath Banerjee*, AIR 2001 SC 3897, para 23.

44 *Dhanvantrai Balwantrai Desai v. Maharashtra*, AIR 1964 SC 575 : 1963 SCR Supl. (1) 485. *Dhanvantrai* was a decision of a 4-judge Bench whereas the decision in *Kundanlal* was that of a 3-judge Bench. J.R. Mudholkar and K. Subba Rao JJ., were not only parties to both the judgments but also wrote the judgments respectively.

45 *Madras v. Vaidyanatha Iyer*, AIR 1958 SC 61. In this case, the Supreme Court made the significant observation that "unlike the case of presumptions of fact, presumptions of law constitute a branch of jurisprudence."

46 The sections were repealed by the Prevention of Corruption Act, 1988 (49 or 1988). Section 4 of the Prevention of Corruption Act of 1947 which was discussed in the decision, and Section 20 of the 1988 Act provided for similar "shall be presumed...unless the contrary is proved".

gratification as a bribe only "unless the contrary is proved", the Court pointed out that:

> the burden resting on the accused person in such a case would not be as light as it is where a presumption is raised under S.114 of the Evidence Act and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one. The words 'unless the contrary is proved' which occur in this provision make it clear that the presumption has to be rebutted by 'proof' and not by a bare explanation which is merely plausible....[47]

It is clear from the above pronouncement:

(1) that in the case of both 'may presume' as well as 'shall presume', the presumption can be rebutted by contrary 'proof' and not by a mere presumption; and

(2) that the 'proof' that is required in rebuttal of the mandatory "shall presume" should be qualitatively stronger than the proof in rebuttal of the discretionary "May Presume."[48]

In this context, it is interesting to note the provisions of Section 10-C of the Essential Commodities Act, 1955 as follows:

> **S. 10C. Presumption of culpable mental state.**—(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.
>
> Explanation: In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.
>
> (2) For the purposes of this section; fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

While Clause (1) of the above provision requires that the Court "shall presume" the existence of the required "culpable mental state" on the part of the accused, it provides that it is open to the accused to plead as "defence" the "fact" of absence of the guilty mind, and clause (2) in effect requires that the accused should prove that fact "to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability." When the accused pleads absence of guilty mind as a "defence" he is in fact rebutting the "shall presumption" drawn against him of the presence of *mens rea* but the bar of standard of proof in rebuttal is raised very high and it shall be proof beyond all reasonable doubt and not mere preponderance of probability. Thus, the presumption of innocence is replaced by presumption of guilt of the accused, and the standard of proof beyond all reasonable

47 *Dhanvantari v. Maharashtra*, AIR 1964 SC 575.
48 See also, Y. *Sreelatha v. Mukanchand Botra*, 2002 (1) LW (Crl.) 271 and *K.R. Subramanian v. V.A. Arumuganathan*, (2003), Criminal Appeal Nos. 906 to 908 of 1996, Madras High Court, *decided on.* 17.07.2003.

doubt normally applied to the prosecution is shifted and laid on the accused.[49] It is submitted that Section 10-C is not happily worded as the section confuses the right of rebuttal of a rebuttable mandatory presumption of law with a defence against a charge.

Section 137(3) of Nigerian Evidence Act, 2011, says: "Where there are conflicting presumptions, the case is the same as if there were conflicting evidence."[50]

Function of Presumptions

In its 91st Report the Law Commission of India observed:

> Speaking of the law of evidence, it may be mentioned that one of the devices by which the law usually tries to bridge the gulf between one fact and another, where the gulf is so wide that it cannot be crossed with the help of the normal rules of evidence, is the device of inserting presumptions. In this sense, it is possible to consider the question whether, on the topic under discussion, any presumption rendering the proof of facts in issue less difficult, ought to be inserted into the law.[51]

Phipson observes that "the chief function of a rebuttable presumption is to determine upon whom the burden of proof rests using that term in the sense of adducing evidence."[52] It means that, in terms of the Evidence Act, the effect of "May Presume" or "Shall Presume", both being rebuttable presumptions, is to place the burden of proof on a party on whom the burden would not lie under the normal rules of burden of proof. Thus, if a person is charged with theft of goods, the burden of proof would normally lie on the prosecution to prove his guilt. But Section 114, illustration (a), says that if the accused is found in possession of stolen goods soon after the theft, he may be presumed to be the thief. Thus, the presumption under the illustration *shifts* the burden from the prosecution to the accused and requires him to give an explanation for his possession to rebut the presumption so that the burden will revert to the prosecution again. Thus, the effect of a presumption could be either to place the burden of proof initially on a party ("reverse burden"[53]) or to shift the burden on to another party. The rebuttable presumption of innocence of the accused places the burden on the prosecution but the presumption under Section 114, illustration (a) shifts it to the accused. Hence, some authors discuss presumptions in the context of rules relating to burden of proof.

49 In *Mariya Anton Vijay v. The State represented by The Inspector of Police, Q Branch C.I.D., Thoothukudi*, Crl. R.C. (MD) No.204 of 2014, the Madras High Court (Madurai Bench), held that "This presumption can be dislodged only during the course of trial by proving beyond reasonable doubt that he did not have the guilty mind."
50 This is a verbatim reproduction of Article 95: "Where there are conflicting presumptions, the case is the same as if there were conflicting evidence." Sir James Fitziames Stephen, *A Digest of Law of Evidence*, (Hartford, Conn., 1904), American edn. by George E. Beers, p. 473.
51 91st Report on Dowry Deaths and Law Reform, 1983, para. 1.4.
52 Sydney L. Phipson, *Law of Evidence*, 10th edn, Michael V. Argyle, edn., (London, 1963), p. 2016.
53 See the discussion in the Chapter on Burden of Proof, *infra*.